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No. _____

In The

Supreme Court of the United States

October Term, 1995

MICHAEL TOTEMOFF,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should grant review to resolve the conflict between the Ninth Circuit's construction of the preemptive scope of Title VIII of the Alaska National Interest and Lands Conservation Act (ANILCA), permitting the State of Alaska to supplant the federal subsistence regulatory program only upon state compliance with ANILCA's requirements, and the Alaska Supreme Court's directly conflicting and egregiously incorrect construction in this case, permitting state regulation in the absence of compliance?

Whether the Court should grant review to resolve the conflict between the Ninth Circuit's construction of ANILCA, permitting a defendant to raise the defense of customary and traditional practice to a criminal prosecution, and the Alaska Supreme Court's directly conflicting and egregiously incorrect construction in this case, prohibiting that defense?

Whether the Court should grant review to resolve the conflict between the Ninth Circuit's construction of "public lands" under ANILCA, as encompassing certain navigable waters, and the Alaska Supreme Court's directly conflicting construction in this case, as excluding such navigable waters?

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Michael Totemoff respectfully petitions for a Writ of Certiorari to review the judgment of the Alaska Supreme Court in this case.

OPINIONS BELOW

The opinion of the Alaska Supreme Court is reported at 905 P.2d 954 (Alaska 1995). (App. 1-44) The opinion of the Alaska Court of Appeals is reported at 866 P.2d 125 (Alaska App. 1993). (App. 45-55) The ruling of the state district court is unreported and is attached. (App. 71-83)

JURISDICTION

The Alaska Supreme Court filed its decision on October 20, 1995. On November 20, 1995, that court denied Mr. Totemoff's timely petition for rehearing. On January 29, 1996, Justice O'Connor extended the time for Mr. Totemoff's Petition for Writ of Certiorari to March 19, 1996. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

This case involves the Alaska Supreme Court's interpretation of a federal statute, the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2377, (1980) (codified as amended at 16 U.S.C. §§ 3101-3233 (1994)). The relevant provisions are reprinted at App. 56-70.

The federal statute was interpreted in the course of resolving issues relating to Petitioner Totemoff's conviction of violating 5 Alaska Administrative Code § 92.080(7), which prohibits the taking of game " . . . with the aid of . . . artificial light. . . . "

STATEMENT OF THE CASE

A. Introduction and Summary of Argument

This offense took place on a remote federal island in Alaska two days after Christmas in 1990. Mr. Totemoff, an Alaskan Native subsistence hunter, shot a deer for meat to bring home to his family and village. His use of a spotlight during the hunt, although a traditional village practice, was illegal under state law. Mr. Totemoff personifies the clash between state and federal law because the state courts refused to apply federal law that would have allowed him to defend his conduct. This Court should grant review because the Alaska Supreme Court has egregiously misconstrued the doctrines of federal preemption.

The conflict in this case has evolved from the breakdown of the program of "cooperative federalism" established by Congress in Title VIII of ANILCA. Under this program, Congress protected the subsistence hunting and fishing rights of rural Alaska Natives and other rural residents by establishing a priority for the subsistence use of fish and wildlife on the "public lands" in Alaska, defined in ANILCA, § 102, 16 U.S.C. § 3102. Congress permitted the State of Alaska to manage subsistence uses on the federal public lands within its boundaries on the

condition that Alaska provide this rural subsistence priority. Until 1989, Alaska avoided federal subsistence use management by enacting "superseding" state law that met ANILCA's requirements, thereby supplanting the federal regulatory scheme. ANILCA § 805(a),(d), 16 U.S.C. 3115(a),(d) (App. 63)

In 1988, the Ninth Circuit construed ANILCA as preempting state subsistence management authority on the public lands where the State either failed or refused to meet the conditions imposed by Congress. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314, 316 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989). The initial breakdown of the program under Title VIII occurred in 1989 when the Alaska Supreme Court held that the "superseding" state law providing the rural subsistence priority required by ANILCA was unconstitutional under the state constitution. *McDowell v. State*, 785 P.2d 1 (Alaska 1989). Consistent with the Ninth Circuit's decision in *Kenaitze*, the Alaska Supreme Court in *McDowell* expressly recognized that the consequence of its holding would be the loss of state management authority on the public lands. *Id.* at 3, 10 n. 20. As a result of *McDowell*, Alaska withdrew from the program. The federal government took over the management of subsistence hunting on the public lands.

Over the following six years of federal management, state and federal law diverged dramatically. From 1989 to 1995, several federal courts held that ANILCA's rural subsistence priority protected customary and traditional hunting practices. (*See* section II, *infra*) The Alaska Supreme Court, in contrast, held that state law did not protect such practices. *State v. Morry*, 836 P.2d 358, 369-70 (Alaska 1990). In addition, the Ninth Circuit held that the "public lands" include certain navigable waters identified

and regulated by federal agencies. *Alaska v. Babbitt*, 72 F.3d 698, 700 (9th Cir. 1995).[1] The conflict created by the diverging case law came to a head in this case when State officers arrested Mr. Totemoff, and he invoked federal law as a defense. Mr. Totemoff was caught between these conflicting interpretations.

The profound conflict between the Alaska Supreme Court and the Ninth Circuit centers on a fundamental difference over the allocation of authority between the State and the United States under ANILCA, and is three-fold. First, the Ninth Circuit has held that ANILCA offers the State of Alaska the choice between "federal regulation or self-regulation with federal oversight." *Kenaitze Indian Tribe v. Alaska*, 860 F.2d at 314. Alaska cannot assert its jurisdiction over federal subsistence hunting unless it has met the conditions laid down by Congress. In Mr. Totemoff's case, the Alaska Supreme Court rejected that construction and held that, under federal law, the State has jurisdiction to regulate federal subsistence hunting on federal lands even in the absence of state compliance with ANILCA.

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[1] The issue of ANILCA's geographic scope is presently pending before this Court on a Petition for Certiorari. *See Alaska v. Babbitt*, No. 95-1084. In *Babbitt*, the Ninth Circuit held that public lands include navigable waters subject to federal reserved water rights identified by federal agencies. *Alaska v Babbitt*, 72 F.3d 698, 700 (9th Cir. 1995). The Ninth Circuit also dismissed with prejudice the State's appeal from a district court holding that Title VIII of ANILCA authorizes the federal government to take over management of subsistence hunting and fishing on public lands in the absence of Alaska laws implementing the subsistence priority. The State of Alaska stipulated to this dismissal. *Id.* at 700, n.2.

Second, the Ninth Circuit has held that ANILCA's rural subsistence priority, which Alaska law has failed to provide, protects customary and traditional hunting practices through a subsistence-based defense. *See, e.g., United States v. Alexander*, 938 F.2d 942, 947-49 (9th Cir. 1991). In Mr. Totemoff's case, the Alaska Supreme Court rejected that construction and held that, under federal law, the State can criminally convict a federal subsistence hunter without allowing that hunter to raise a subsistence-based defense.

Third, the Ninth Circuit has held that ANILCA's definition of public lands includes certain navigable waters identified and regulated by federal agencies. *Alaska v. Babbitt*, 72 F.3d 698, 700 (9th Cir. 1995). In Mr. Totemoff's case, the Alaska Supreme Court reached out to apply state jurisdiction over Mr. Totemoff's conduct on the offshore waters of the federal island. The court rejected the Ninth Circuit's construction and held that ANILCA does not include such waters. The State of Alaska, therefore, refuses to recognize federal jurisdiction over those waters.

In affirming Mr. Totemoff's conviction, the Alaska Supreme Court declared that Alaska had not "voluntarily ceded" or "consented to exclusive federal control" and that the Alaska Supreme Court was "not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law." (App. 3, 18)

There are three main reasons why this Court should resolve these conflicts. First, principles of "cooperative federalism" enable a state to regulate an activity over which Congress would otherwise possess plenary authority. However, in order to do so, the State must comply

with the national standards established by Congress. Alaska has not complied with ANILCA's prerequisites, and the Alaska Supreme Court has purported to relieve the State of this obligation. Second, the incoherent management regime created by these conflicts is a critical practical issue to thousands of rural Alaskans who rely daily on subsistence as a way of life but are left without guidance as to which law to follow. Third, subsistence hunters prosecuted by the State for offenses committed on federal land or water should not face criminal conviction, up to a year in jail, and fines and forfeitures where state law denies that hunter defenses available under federal law.[2] In order to resolve these critical conflicts, this Court should grant review and enforce the Congressional mandates.

B. Facts

Mr. Totemoff is a 58 year old Aleut who lives with his family in Tatitlek, the oldest remaining Native village in Prince William Sound. The village does not have a grocery store. Consequently, Mr. Totemoff must support his family through traditional subsistence hunting and fishing. The Totemoffs eat bear, goat, fish, seal, sea lion, duck and deer. Because deer are plentiful, they are a staple.[3]

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[2] Mr. Totemoff was convicted of the state Class A misdemeanor criminal offense of killing a deer with the aid of artificial light. 5 AAC 92.080(7). This offense carries a maximum penalty of one year in jail and/or a $5000 fine. The trial court's sentence included the forfeiture of Mr. Totemoff's rifle and skiff, a $500 fine, one year of suspended jail time, and probation.

[3] "Subsistence" refers to the hunting, fishing and gathering activities upon which Alaska's Native peoples rely to feed,

Effective July 1, 1990, as a result of *McDowell v. State*, 785 P.2d 1 (Alaska 1989), the federal government withdrew Alaska's certification to manage subsistence on public lands because Alaska failed to comply with ANILCA. *Alaska v. Babbitt*, 72 F.3d at 701, *cert. pending on other grounds*, No. 95-1084. The federal government assumed jurisdiction and published temporary subsistence regulations essentially mirroring state law. 55 Fed. Reg. 27,115 (June 29, 1990) The State of Alaska retained authority to manage all *non*-subsistence hunting and fishing on federal and state lands and waters, as well as subsistence hunting and fishing on non-public lands.

On December 27, 1990, Mr. Totemoff and a hunting partner travelled in a small skiff through dark, rough seas, freezing rain and snow. Mr. Totemoff was subsistence hunting for deer for his family and village along

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clothe, and house themselves. Subsistence is both an economic necessity and a way of life. Most villagers, even those who earn a wage, still choose to practice subsistence out of cultural and economic necessity. Subsistence is not just eking out the barest food, clothing and shelter needed to sustain life. Subsistence involves the health of the spirit through the connection to the land and sea that comes with participating in the seasonal cycles of harvest. All members of the village – men, women, children, the young and old, the healthy and the sick – participate in the many different stages of the hunting, the fishing, the trapping, the whaling, and the gathering. Subsistence is a tribal communal practice of sharing, of honoring the traditional legends, customs and ceremonies accompanying the harvest, and the passing on those traditions to the young. Subsistence, then, is the practice of living off the land in the way that connects each new generation to past generations. *See generally* M. Bruzzese, Comment, *U.S. v. Alexander: Defining and Regulating "Subsistence Use" of Resources Among Alaska Natives*, 33 Natural Resources Journal 461, 485-87 (1993).

Naked Island. Naked Island is federal public land and was open to federal subsistence hunting. The federal subsistence regulation in effect authorized a season bag limit of four deer. 56 Fed. Reg. at 29318. At this latitude in Alaska at the end of December, there are only about five hours of daylight per day. While in his skiff, Mr. Totemoff used a small spotlight to illuminate the shoreline.[4] He shot and killed a deer in the brush. State officers arrested him for using a hunting method prohibited by state law.

C. Proceedings Below

Totemoff filed a timely pre-trial motion to dismiss the case for lack of jurisdiction. He also timely requested permission to defend his hunting practice as customary and traditional in the village of Tatitlek and therefore protected under ANILCA. The trial court rejected his

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[4] Three experts testified at the pretrial evidentiary hearing. These experts agreed that the use of spotlights by Tatitlek villagers was a customary, traditional and efficient technique that villagers used during winter months when weather was bad and time – and daylight – were short. Alaska's Regional Program Manager for the Division of Subsistence testified that spotlight use by Tatitlek villagers has been customary and traditional since the 1940's. The technique "freezes" the deer, resulting in more accurate shots, less wasted meat, and shorter time in transport and in the field. He further testified that this practice did not threaten the deer resource because the villagers do not abuse the technique's effectiveness.

Totemoff also submitted the federal temporary subsistence regulations and evidence that the United States Fish and Wildlife Service, Subsistence Management Division, applied these regulations to subsistence takings on public lands unless these regulations did not cover the conduct in question and a state regulation did.

preemption argument and ruled that under state law, Totemoff could not raise a customary and traditional practice defense, even if based on federal law. (App. 77-83) Nevertheless, the trial court ruled that Totemoff had killed a "federal deer" on public land. (App. 77) The trial court concluded that the state could not base its jurisdiction on Naked Island's offshore waters and never reached Totemoff's argument that ANILCA applied in those waters. The case proceeded to trial, and a state jury convicted Mr. Totemoff of the charged offense.

Totemoff filed a timely appeal to the Alaska Court of Appeals challenging the denial of his motions. The Court of Appeals affirmed Totemoff's conviction while agreeing that Totemoff committed his offense on federal land. (App. 47 n.3) As a result, the intermediate appellate court failed to resolve whether ANILCA applied to Naked Island's offshore waters.

Totemoff next sought discretionary review with the Alaska Supreme Court. The state did not cross-petition to challenge the Court of Appeals ruling that the offense was committed on federal land. The Alaska Supreme Court granted Totemoff's petition and directed the parties to address whether ANILCA's federal subsistence defense was available to Totemoff if state law prohibited that defense. (App. 84) If the federal defense was available, the court further directed the parties to address whether Totemoff's conviction could be sustained solely under state law. (App. 85) Finally, the court directed the parties to address whether the federal district court's decision in *John v. United States*, Nos. A 90-0484 & 0264-CV (HRH), 1994 WL 487830 (D. Alaska, March 30, 1994), holding that ANILCA applied to all navigable waters, precluded the state in Totemoff's case from arguing that

Naked Island's offshore waters were not subject to ANILCA. (App. 85) After all the briefing had been completed, the court directed the parties to address, in memo form, the Ninth Circuit's decision in *Alaska v. Babbitt*, 54 F.3d (April 20, 1995), superseded by 72 F.3d 698 (Dec. 19, 1995), applying ANILCA to waters subject to federal reserved water rights. (App. 85)

The Alaska Supreme Court upheld the application of the State's criminal regulation to Mr. Totemoff.[5] Without analysis of either Title VIII's language or federal case law, the court concluded that "[n]o provision in ANILCA expressly preempts state enforcement of state hunting laws against subsistence hunters on federal land." (App. 4) The court further held that ANILCA does not preempt state law because Congress did not intend to occupy the field and federal law does not protect customary and traditional hunting practices. (App. 8, 12) Finally, asserting that it was "not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law," the court specifically rejected the Ninth Circuit's decision in *Alaska v. Babbitt* and held that "the federal government has no authority based on the navigational servitude or the reserved water rights doctrine to regulate hunting and fishing in Alaska's navigable

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[5] The Alaska Supreme Court issued its initial opinion on August 7, 1995. On October 20, 1995, the court withdrew its earlier opinion *sua sponte* and issued a corrected opinion. (App. 1)

waters." (App. 18) Totemoff's timely filed petition for rehearing was denied on November 20, 1995.[6]

REASONS FOR GRANTING THE WRIT

Introduction

This Court should grant this petition because Alaska desperately needs a clarification of the preemptive effect of ANILCA. The State of Alaska needs clarification on how and where it may manage subsistence. The state and federal law enforcement and subsistence management agencies need to know which laws to apply and where to enforce them. Alaska's rural residents, especially those who live in over 200 Native villages and engage in subsistence as a tribal activity that defines Native culture, need to know how and where they can hunt and fish. The findings of a specially created congressional committee support review.

In 1990, Congress created the Joint Federal-State Commission on Policies and Programs Affecting Alaska

[6] The Alaska Supreme Court's judgment on the federal issues is final even though the court remanded Totemoff's case for a determination of whether the state regulation was properly promulgated under the Alaska Administrative Procedure Act. *Cox Broadcasting v. Cohn*, 420 U.S. 469, 476-87 (1975) (applying a pragmatic approach in determining that judgment is final where pending state proceedings are wholly unrelated to the federal questions, the state court judgment is plainly final on the federal issue and not subject to further state court review, and immediate review would be the best way to avoid economic waste and delayed justice). No hearing has been scheduled in the trial court pending the filing of this petition.

Natives. Congress directed this Commission to conduct a comprehensive study of the policies and programs of the United States and the State of Alaska that affected Alaska Natives. The Commission's findings on subsistence illustrate why this Court should resolve the conflicts between the Alaska Supreme Court and the Ninth Circuit.

First, the Commission concluded that "[s]tate court constructions of state subsistence statutes are now irreconcilably different from federal court interpretations of ANILCA . . . [T]he underlying clash of legal ideologies is probably permanent and irreconcilable." Final Report, Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives (vol. III at 35-36, May 1994). Second, the Commission believed that "[t]he State of Alaska will not provide adequate protections of subsistence against the demands of sport, commercial and other uses of fish and game. . . . The only bulwark protecting Alaska Natives from the power of an adversarial state government is federal law." *Id.* at 40. Third, the Commission found that "the subsistence interests of Native people will be best protected by maximum extension of the geographic scope of ANILCA jurisdiction." *Id.* at 41. Fourth, the Commission determined that "the only power likely to persuade the state government to resolve the ANILCA impasse through a constitutional amendment is the full force of federal intervention in fish and game management." *Id.* at 37. Finally, the Commission observed that "[i]n its distribution of limited resources among competing user groups, subsistence law is social policy on a grand scale. The way in which the current conflict over fish and game allocations is resolved will do more to influence the future economic and social conditions of the

rural areas of this state than any other issue addressed by the Joint Commission." *Id.* at 40.

The Alaska Supreme Court's decision in *Totemoff* exacerbates this irreconcilable conflict on two key issues of preemption: (1) whether ANILCA expressly preempts Alaska law and (2) whether Alaska's failure to recognize a subsistence-based defense preempts state law. The Alaska Supreme Court indicated in *Totemoff* that it will be bound solely by this Court on these issues.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT AND THE ALASKA SUPREME COURT HAVE DIRECTLY CONFLICTING DECISIONS ON ANILCA'S PREEMPTIVE EFFECT THAT CAN ONLY BE RESOLVED BY THIS COURT

Federal preemption takes several forms. It may be express. "Field" preemption occurs when a pervasive scheme of federal regulation in an area of overriding federal interest forecloses the enforcement of state laws on the same subject. State law is also preempted to the extent that it "actually conflicts with federal law . . . when compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Com'n*, 461 U.S. 190, 203-04 (1983) (citations and quotation marks omitted). ANILCA preempts the application of Alaska state law to subsistence hunting on federal lands under each theory.

Mr. Totemoff asserts that ANILCA expressly preempts state law in this case. In order to protect the "subsistence way of life" of Alaska's Natives and other rural residents, Congress enacted Title VIII of ANILCA pursuant to its constitutional authority over Native affairs and its powers under the Property and Commerce Clauses. ANILCA §§ 101(a)-(c) (16 U.S.C. § 3101(a)-(c)) and § 801(4) (16 U.S.C. § 3111(4)) Under section 804, the taking of fish and wildlife by rural residents for subsistence use must be given a priority over taking for other purposes. 16 U.S.C. 3114. (App. 60)

Title VIII establishes only two subsistence management options: direct management by the Secretaries of Agriculture and Interior, or state management with federal monitoring. The Act requires the Secretary to establish the administrative structure necessary to provide rural Alaska residents with a priority for subsistence hunting and fishing on public lands. 16 U.S.C. §§ 3113, 3114.[7]

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[7] Section 805(a) provides that "the Secretary . . . shall establish . . . subsistence resource regions" composed of "regional advisory council[s]" and, if necessary, "local advisory committees." 16 U.S.C. § 3115 (a)(1)-(3). (App. 61) Subsections 805(a)(3)(A), and (D) provide that the regional advisory councils "shall have the . . . authority" to, among other things, review and evaluate "proposals for regulations, policies, [and] management plans" affecting subsistence uses, and prepare an annual report to the Secretary that "shall" include regulatory recommendations to satisfy subsistence needs and uses. 16 U.S.C. § 3115. (App. 61-62) Section 805(a)(2) and (D)(iv) provide that "state fish and game advisory committees . . . may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph." 16 U.S.C. § 3115. (App. 62) Sections 805(b) and (c) mandate that the "Secretary

Congress expressly recognized that direct federal implementation of Title VIII altered the state's "traditional" management role. "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in title VIII* of this Act . . . , or to amend the Alaska Constitution." 16 U.S.C. § 3202(a) (emphasis added) Similarly, *"[e]xcept as specifically provided otherwise by this Act,* nothing in this Act is intended to enlarge or diminish the responsibility and authority" of the Secretary over the management of the public lands. 16 U.S.C. § 3202(b) (emphasis added) (App. 70)

The Act provides only one exception to the mandatory federal scheme: "except as otherwise provided in subsection (d)." Section 805(a), 16 U.S.C. § 3115(a) Subsection (d) provides:

> *The Secretary shall not implement* subsections (a), (b) and (c) of this section *if* within one year from the date of enactment of this Act, *the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede* such sections insofar as

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shall assign adequate qualified staff to the regional advisory councils" and "shall consider the [council's] report and recommendations." 16 U.S.C. § 3115. (App. 62-63) Section 814 provides that the "Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title [VIII]." 16 U.S.C. § 3124. (App. 69)

> such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses.

Section 805, 16 U.S.C. § 3115(d) (emphasis added) (App. 63-64)

Until 1989, Alaska law provided for the rural subsistence priority. Therefore the State of Alaska was the single, unitary fish and game manager of subsistence and non-subsistence hunting and fishing on both state and federal lands and waters in Alaska. In 1989, the Alaska Supreme Court concluded that the state rural subsistence priority violated the "equal access" provisions of the Alaska Constitution. *McDowell v. State*, 785 P.2d 1 (Alaska 1989). As a result of this effective "repeal" of the state laws designed to comply with ANILCA, the Secretary withdrew Alaska's certification and took over implementation of Title VIII on public lands. Under this system of dual management, the Secretary directly manages subsistence activities on public lands. Alaska manages *non*-subsistence hunting and fishing on state and federal lands and waters, as well as subsistence uses on non-public lands.

The Alaska Supreme Court agreed that Totemoff was subsistence hunting for deer on public lands, that Alaska was "out of compliance with ANILCA" and that the Secretary had "fully implemented" a federal regulatory program on public lands under § 805(a)-(c) of Title VIII. (App. 2, 6) However, the court held that ANILCA does not expressly preempt "state enforcement of state hunting laws against subsistence hunters on federal land" and that Congress did not intend the federal government to exclusively occupy the field of subsistence regulation.

(App. 4, 8) As explained below, this unprecedented interpretation is directly contrary to the law of the Ninth Circuit.

In *New York v. United States*, 505 U.S. 144, 167 (1992), this Court "recognized Congress' power [under the Commerce Clause] to offer States the choice of regulating . . . [private] activity according to federal standards or having state law pre-empted by federal regulation." (dicta) Calling this arrangement "a program of cooperative federalism" featured in many federal statutory schemes, this Court specifically cited Title VIII of ANILCA and Judge Kozinski's opinion in *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9th Cir. 1988). The preemption of state law under such a program of cooperative federalism is a "permissible method of encouraging a state to conform to federal policy choices" because the state's citizens "retain the ultimate decision as to whether or not the state will comply." *New York v. United States*, 505 U.S. at 168.

A congressional intent to preempt state action is determined from the explicit statutory language and purpose of the statute. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 96 (1992). Judge Kozinski concluded that the plain language of Title VIII of ANILCA gives Alaska the choice between "federal regulation or self-regulation with federal oversight." *Kenaitze Indian Tribe v. Alaska*, 860 F.2d at 314. Alaska could assume the limited role of "supplanting the federal regulatory scheme" only if it enacted state laws that were consistent with the operative federal provisions. *Id.* at 314, 316. In the context of determining whether deference was due to the state's definition of "rural," Judge

Kozinski further analyzed the state's limited role as follows:

> Most fundamentally, unlike a federal agency, *the state is delegated no authority under ANILCA. The statute only provides that if the state wishes to regulate in a manner consistent with federal law, federal regulation will be withheld.* ANILCA does not assign any particular functions to the state as, indeed, it could not. As a separate sovereign, the state is at all times free to refuse to regulate; Congress could not compel it to do so. *If the state refuses, the Department of the Interior will step in and do the job. The state's role is thus more accurately characterized as supplanting the federal regulatory scheme, rather than implementing it.*

Id. at 316 (emphasis added). The state is "asked to regulate in conformity with federal requirements, *or not at all,*" to "either *[abandon] regulation of the field altogether* or [consider] the federal standards." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 766-67 (1982) (emphasis added). State noncompliance results in "the *full* regulatory burden [being borne] by the Federal Government." *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (emphasis added). Under the Commerce Clause, Congress may "prohibit all – and not just inconsistent – state regulation" even if the federal legislation displaces "exercises of state police power." *Id.* at 290-91.[8]

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[8] In *FERC*, this Court upheld Congress' power under the Commerce Clause to use the states as agents in implementing a national regulatory program governing electric and gas utilities. The federal statute "simply establish[ed] requirements for continued state involvement in an otherwise pre-emptible field." 456 U.S. at 769 (footnote omitted). *FERC* approved state

A key factor in preemption analysis is the "real effect on federal rights." *Livadas v. Bradshaw*, ___ U.S. ___, 114 S.Ct. 2068, 2075-76 (1994) (consistency of state and federal law irrelevant); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 102 (1992) (state cannot "supplement" federal regulations with nonconflicting standards where state plan has not met federal approval). The decision below gives Alaska an unprecedented windfall: the right to exercise its criminal jurisdiction over federally protected rights to hunt on federal lands without having to comply with the requirements of federal law (ANILCA).[9] Alaska can therefore use the powerful tool of its criminal law to control subsistence resource use on federal land over which it has no management authority. The decision below subjects federal subsistence hunters to state criminal penalties and forfeiture of assets essential to their

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administration of federal regulatory policies under a congressional threat that *all* state utility regulation would be prohibited for failure to implement national utility standards.

In *Hodel*, this Court upheld Congress' power under the Commerce Clause to require that state regulation of surface coal mining operations meet national environmental standards. If the Secretary of the Interior did not approve the state's program, the Secretary would directly implement national regulation. 452 U.S. at 288-93. *Hodel* approved Congress' power to secure state regulation of surface mining under a threat of the imposition of direct and *exclusive* national regulation for failure to implement national environmental standards.

[9] Ironically, Alaska had successfully lobbied Congress for the rural subsistence priority. Alaska persuaded Congress that a Native preference would violate the state constitution. Congress therefore broadened its original intent to protect only a Native priority. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d at 313 n.1.

subsistence lifestyle, even when the activities of such hunters are authorized by federal law.

The Alaska court reached this remarkable result by ignoring the plain language of the statute and more than a decade of uniform state and federal practice and judicial construction.[10] "[W]hen statutory language [in

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[10] *See, e.g., Alaska v. Babbitt*, 72 F.3d at 700 n.2 ("Title VIII of ANILCA authorizes the federal government to manage subsistence hunting and fishing on public lands in the absence of Alaska laws implementing the subsistence priority"); *Native Village of Quinhagak v. United States*, 35 F.2d 388, 290 (9th Cir. 1994) ("Alaska's noncompliance with ANILCA made the federal government responsible . . . for implementing ANILCA as to 'public lands'."); *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) (ANILCA "leaves implementation to the Secretary of the Interior," but it "also contains an opt-in-clause for the State of Alaska."); *Bobby v. Alaska*, 718 F.Supp. 764, 784 (D. Alaska 1989).

Indeed, in the *McDowell* decision, the Alaska Supreme Court itself acknowledged the complete preemptive scope of ANILCA:

> *ANILCA requires federal management of public lands in Alaska in order to ensure the subsistence priority.* However, federal management *may* be supplanted by the state *so long as* the state enacts and implements subsistence laws "which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA.
>
> * * *
>
> A third purpose [of the 1986 state rural subsistence priority law] is to *comply with ANILCA in order to retain fish and game control on federal lands.* It is difficult to view this as a sufficiently important purpose. ANILCA does not require state compliance. State control merely for the sake of control is a questionable

ANILCA] is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily 'the end of the matter'." *Kenaitze Indian Tribe v. Alaska*, 860 F.2d at 318, quoting *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987) (citation omitted). Nor is this a "rare and exceptional" case "where the application of the statute as written will produce a result demonstrably at odds with the intentions of its drafters." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). (citation and internal quotes omitted)

The Alaska Supreme Court's analysis is unsound. Having freed itself from Title VIII's plain language and structure, the court simply treated this case as one involving the state's traditional police power to regulate hunting. (App. 5) But the federal government has both an express Indian Commerce Clause power under Article I,

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> goal when the terms infringe upon the open access values of article VIII [of the state constitution].

McDowell v. State, 785 P.2d at 3, 10 n.20 (emphasis added; footnote omitted).

Recent commentators have also concluded that Title VIII, "like other modern experiments in cooperative federalism," offers Alaska the opportunity to manage federal lands as a "quid pro quo" for compliance with ANILCA standards; failure to comply results in loss of management. *See* J. Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 Alaska L. Rev. 247, 264-66 (Dec. 1995); Note, W. Bryner, *Towards a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 Alaska L. Rev. 293, 304-05, 309 n. 74, 312, 315 (Dec. 1995); *U.S. v. Alexander: Defining and Regulating "Subsistence Use" of Resources Among Alaska Natives, supra* n.3, at 469-70. Three Interior Secretaries, four Alaska Governors, and the various Alaska State Legislatures and Attorneys General over the past decade have shared this view.

§ 8, cl. 3 of the Constitution, and a "fiduciary duty" to "protect the subsistence resources of Indian communities." *People of Togiak v. Alaska*, 470 F.Supp. 423, 428 (1979); *Morton v. Mancari*, 417 U.S. 535, 553-55 (1974); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 179-81 (1973). As a "treaty substitute," Title VIII is interpreted in the same manner as a treaty. *See* C. Wilkinson, American Indians, Time and the Law at 8 (1987). Furthermore, Title VIII is Indian legislation, and any doubtful language must be construed to further the congressional purpose to benefit the Alaska Native people. *People of Village of Gambell v. Clark*, 746 F.2d 572, 581 (9th Cir. 1984), *rev'd on other grounds sub. nom, Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987).

Title VIII of ANILCA reflects the special trust relationship between the federal government and Alaska Natives and the duty to safeguard subsistence as culture. Title VIII is a comprehensive scheme in the area of Indian affairs where historically the direct involvement and responsibility of the federal government have been exceptionally pervasive. ANILCA's total statutory scheme shows that Congress described in plain, detailed, and comprehensive terms the circumstances whereby Alaska could supplant or supplement federal regulation. Non-compliance with ANILCA's operative preference was expressly not such a circumstance.

The factors relied upon by the court below to defeat Congress' purpose are unpersuasive. It improperly relied upon Congress' provision for local and regional advisory councils and the policy of cooperation and interaction between state and federal agencies. (App. 6-8) But those provisions simply reflect Congress' intent to involve local citizens and state agencies when the Secretary is directly implementing Title VIII. Those provisions and policies are simply irrelevant to the question of whether Alaska can

assert its criminal jurisdiction over federally protected subsistence activities after surrendering its subsistence management authority by failing to provide the rural priority.

II. A FEDERAL SUBSISTENCE HUNTER SHOULD NOT FACE STATE CRIMINAL CONVICTION AND INCARCERATION WHEN HE HAS BEEN PRECLUDED BY STATE LAW FROM RAISING A FEDERAL DEFENSE

Under Alaska law, "customary and traditional" refers only to post-harvest subsistence uses, not the methods and means of harvest themselves. *State v. Morry*, 836 P.2d 358, 369-70 (Alaska 1992). Alaska also has a "no subsistence defense" statute.[11] The court below, relying on a restrictive reading of federal case law, held that federal law under ANILCA does not preempt state law because federal law does not protect customary and traditional subsistence hunting methods. (App. 12)

Congress, however, expressed a clear directive to protect the cultural aspects of the subsistence lifestyle in § 801(1) of ANILCA: "[T]he continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is *essential to* Native physical, economic, *traditional, and cultural existence*. . . . " 16 U.S.C. 3111(l) (emphasis added). (App. 57) The provisions of Title VIII (16 U.S.C. § 3111-3126) broadly require that fish and game on Alaska's federal land be managed in a manner giving preference to "the subsistence

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[11] Alaska Statute 16.05.259 states, "In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses."

way of life." (App. 57-59) The House Committee on Interior and Insular Affairs emphasized that:

> [T]echnology and techniques employed by those making subsistence uses of resources . . . may be subject to continuing change in the future as they have been in the past; the committee does not intend that any such change, by itself, should be considered as inherently impermissible or as necessarily placing subsistence users completely outside the scope of this act.

H.R. Rep. No. 95-1045, Part I, 95th Cong.; 2d Sess. 186 (1978).

The federal courts have consistently interpreted ANILCA as protecting customary and traditional subsistence hunting practices. "Subsistence needs are not limited to maintaining a sufficient food supply, but include customary and traditional practices which ANILCA was designed to protect." *Alaska Wilderness and Tourism Ass'n v. Morrison*, 67 F.3d 723, 731 (9th Cir. 1995).[12] As the federal district court

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[12] Under federal law, a subsistence hunter can raise a "subsistence defense" to the judge or jury; state law prohibits such a defense. *Compare U.S. v. Alexander*, 938 F.2d 942, 948-49 (9th Cir. 1991), and *Bobby v. Alaska*, 718 F.Supp. 764, 778 (D. Alaska 1989), *with State v. Eluska*, 754 P.2d 514 (Alaska 1986), and AS 16.05.259. Under federal law, a subsistence hunter may obtain dismissal of his charge by proving that his conduct was customary and traditional and therefore the state law was invalid as applied; he cannot do so in state court. *Compare U.S. v. Alexander*, 938 F.2d at 948 and *U.S. v. Skinna*, 931 F.2d 530, 533 (9th Cir. 1990), *with State v. Morry*, 836 P.2d 358, 370 (Alaska 1992). Under federal law, a subsistence hunter's failure to petition the Board of Game does not result in his forfeiting his right to challenge, at trial, the regulations with which he is charged; in state court, forfeiture results. *Compare U.S. v. Alexander*, 938 P.2d at 947 *with* the commentary to AS 16.05.259.

stated in 1989 when Alaska *was* in compliance with ANILCA,

> the [Alaska] legislature may not preclude a defendant from challenging the statute or regulation under which he is charged. . . . Neither ANILCA nor Alaska's second subsistence law preclude a defendant from challenging the validity of a hunting regulation as a defense to a criminal prosecution. . . . the State of Alaska cannot authorize the Board of Game to adopt regulations which can lead to criminal sanctions and make them incontestable by defendants when the state seeks to enforce the regulations.

Bobby v. Alaska, 718 F.Supp. at 786-88. *Bobby* held that ANILCA protects traditional village hunting practices. *Id.* at 780-81. The reasoning of *Bobby* and *Native Village of Quinhagak, supra*, n.10, carries even more weight in a criminal case where a person's liberty is at stake.

The decision below denies this defense to a rural subsistence hunter hunting federal game on federal land. (App. 12, 43) State law subjects that hunter to conviction and to a year in jail but prohibits that hunter from raising a defense based

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Furthermore, under federal law, a subsistence hunter may invalidate a state regulation by showing that there was no "substantial evidence" presented to the Board that the regulation did not adversely affect subsistence needs; he cannot do so in state court. *Compare Bobby v. Alaska*, 718 F.Supp. at 778-80 *with State v. Morry*, 836 P.2d at 370. The court in this case did permit a state law challenge on the limited grounds that the regulation was promulgated in violation of the state Administrative Procedure Act (App. 39, 43), but this "defense" is so circumscribed as to be virtually meaningless.

on the traditional character of his hunting practice under federal law. This conflict preempts state law.

III. STATE LAW STANDS AS AN OBSTACLE TO CONGRESSIONAL PURPOSES AND OBJECTIVES

Even if ANILCA did not present an express conflict with state law in this case, the court below failed to apply the correct test: whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Electric Co.*, 496 U.S. 72, 80 (1980).

Federal law embraces a special trust relation with Alaska Natives. Alaska law recognizes no such relationship. Federal law treats ANILCA as Indian legislation subject to rules of statutory construction that benefit Natives. Alaska law views ANILCA as irrelevant to its traditional police powers, and resolves any ambiguities to the detriment of Natives. Federal law prioritizes the use of threatened resources by mandating a rural subsistence preference. Alaska law prioritizes equal access by all Alaskans, thereby increasing both the ability of non-natives to use scarce resources and the likelihood that those resources will be further depleted. Federal law protects the cultural aspects of subsistence and permits a subsistence defense to protect customary and traditional practices. Alaska law prohibits a subsistence defense, and imposes criminal penalties on those who engage in such practices.[13]

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[13] In addressing harvesting practices, "[t]he *Morry* court ignored the fact that customary and traditional methods of harvest are often the hallmark of subsistence as culture . . . *Alexander* . . . recognized that subsistence users within

Alaska's prohibitions are obstacles to ANILCA's purposes and objectives. As this Court stated in *Livadas v. Bradshaw*, ___ U.S. ___, 114 S.Ct. at 2074, "[a] state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." Similarly, in *Gade v. National Solid Wastes Management Ass'n*, ___ U.S. ___, 112 S.Ct. at 2383, this Court held that "non-approved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly preempted as in conflict with the full purposes and objectives of the OSH Act."

IV. THE RESULT OF SEPARATE SOVEREIGNS WITH COMPLETE DISCRETION OVER GOVERNMENTAL POLICIES AND PROCESSES, EACH CLAIMING JURISDICTION OVER FEDERAL LANDS AND WATERS AND APPLYING DIFFERENT SUBSISTENCE POLICIES, IS EXPENSIVE AND INCOHERENT MANAGEMENT THAT DAMAGES NATIVE CULTURE

The Ninth Circuit's decision in *Alaska v. Babbitt* requires federal subsistence use management of federal public lands, including navigable waters subject to federal reserved water rights. (App. 17-18) The permanent federal subsistence regulations are voluminous. The Alaska Supreme Court's decision in this case authorizes

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the meaning of ANILCA cannot be punished criminally for engaging in subsistence activities." Note, *Towards a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 Alaska L. Rev. at 313 n. 96, 317 (internal quotations and footnote omitted).

state subsistence management of federal public lands and all navigable waters. (App. 18) State regulations are similarly complex, and Alaskans already complain that they need a lawyer to understand them. State authorities will follow *Totemoff*, and federal authorities, *Babbitt*. Rural residents, caught in the middle, will not know which law applies, or where it applies.

For example, state regulations prohibit hunting deer from boats in certain areas, but federal subsistence regulations permit such hunting in those same areas. *Compare* 5 AAC 92.085(9) *with* 36 C.F.R. 242.25(k)(4)(iii) *and* 50 C.F.R. 100.25(k)(4)(iii). *See* State's petition in *Alaska v. Babbitt*, No. 95-1084, p.11 n.4. Moreover, both state and federal authorities have adopted a broad definition of "take" that includes any "attempt" to engage in a take. *See* A.S. 16.05.940(33) (App. 14) and ANILCA sections 102, 16 U.S.C. 3122 (App. 56), defining "take", and 811(b), 16 U.S.C. 3121(b) (App. 10, 67-68) (permitting the use of motorboats by federal subsistence hunters to access federal lands). Since subsistence uses often take place on both land and water, *Totemoff* gives the state plenary authority over those uses. The potential for further crippling litigation and cultural disruption over what law applies and where it applies is enormous unless this Court resolves the conflicts between the Ninth Circuit and Alaska's highest court.

V. ANILCA'S APPLICATION TO NAVIGABLE WATERS DETERMINES WHETHER NATIVE HUNTING, FISHING, AND CULTURE WILL BE PROTECTED BY THE SUBSISTENCE PRIORITY

"Public lands" are "lands, waters and interests therein, the title to which is in the United States." *Amoco*

Production Co. v. Gambell, 480 U.S. 531, 548, n. 15 (1987) (melding definitions in 16 U.S.C. § 3102 (1)-(3); internal quotations omitted). *Alaska v. Babbitt*, 72 F.3d at 703-04, held that public lands include navigable waters subject to federally reserved water rights. By contrast, the Alaska Supreme Court ruled that public lands do not include such waters, nor any waters subject to the paramount national interest reflected in the dominant navigational servitude. (App. 17, 31)

The definition of "public lands" rests upon "its context in [the] statute." *Amoco Production Co. v. Gambell*, 480 U.S. at 548, n. 15. Congress enacted ANILCA under the Property and Indian Commerce Clauses as well as the Commerce Clause, upon which the navigational servitude is based. ANILCA is remedial legislation; it must be broadly construed to effect congressional intent.

The Alaska Supreme Court was incorrect to hold that ANILCA did not apply to navigable waters. The Submerged Lands Act upon which it relied does not preclude Congress from regulating, pursuant to the Commerce Clause, fisheries in a state's navigable waters. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 283-86 (1977). Furthermore, in *Amoco*, this Court rejected the Alaska Supreme Court's conclusion that the United States cannot hold "title" to public lands or water under ANILCA unless it holds technical fee title. *Amoco Production Co. v. Village of Gambell*, 480 U.S. at 548, n. 15. And, while the Ninth Circuit in *Babbitt* correctly held that ANILCA applies to some waters, only ANILCA's application to all waters subject to the doctrine of navigational servitude of the United States fully satisfies Congress' intent to protect Native fishing, hunting and culture on all public lands.

The navigational servitude is the public property of the Nation, and that interest is paramount over any state proprietary interests. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 338, n. 6 (1982); *Montana v. United States*, 450 U.S. 544, 555 (1981); *Gilman v. Philadelphia*, 70 U.S. 713 (U.S. Pa. Dec. Term 1865).

The State of Alaska has petitioned for certiorari on this issue. *See Alaska v. Babbitt*, No. 95-1084. If Alaska manages navigable waters, all Alaskans will have an equal right to take fish and game, and no one will have the priority right to use customary and traditional hunting and fishing methods. If the federal government manages waters, rural residents, especially Alaska Natives, will be afforded a priority for their fishing and hunting, and their customary and traditional practices – their very culture and existence – will be protected.

CONCLUSION

This Court should grant a writ of certiorari to the Alaska Supreme Court.

Respectfully submitted,

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March 19, 1996

Michael TOTEMOFF, Petitioner,

v.

STATE of Alaska, Respondent.

No. S-6151.

Supreme Court of Alaska.

Oct. 20, 1995.

Rehearing Denied Nov. 20, 1995.

Paul E. Malin, Assistant Public Defender, John B. Salemi, Public Defender, Anchorage, for Petitioner.

Joanne Grace, Assistant Attorney General, Anchorage, Bruce M. Botelho, Attorney General, Juneau, for Respondent.

Before COMPTON, C.J., and RABINOWITZ, MATTHEWS, MOORE and EASTAUGH, JJ.

ORDER

IT IS ORDERED, SUA SPONTE:

1. Opinion No. 4236 issued in this case on August 7, 1995, is WITHDRAWN.

2. Corrected Opinion No. 4276 is issued today in its place. The corrections are found in the last full paragraph on page 18 and in the first full paragraph on page 26.

Entered by direction of the court at Anchorage, Alaska on October 20, 1995.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

MATTHEWS, Justice.

Subsistence hunter Mike Totemoff shot a deer with the aid of a spotlight in December 1990. The deer was killed on federal land, Naked Island in Prince William Sound. However, Totemoff was in a skiff in navigable waters surrounding Naked Island when he shined his spotlight at the deer and fired the fatal shot.

Totemoff was charged with violating 5 Alaska Administrative Code (AAC) 92.080(7), which prohibits hunting with the aid of an artificial light. Totemoff moved to have the indictment dismissed, arguing that the State did not have jurisdiction to prosecute him and that the regulation prohibiting spotlighting was invalid. To support some of his arguments, Totemoff presented evidence that spotlighting is a customary and traditional means of hunting deer for subsistence in his native community of Tatitlek. The district court ruled that the State did have jurisdiction to prosecute Totemoff. The district court held that Alaska law prohibits subsistence hunters from challenging, in a criminal proceeding, the regulations under which they are prosecuted.

The case proceeded to trial, and Totemoff was convicted. The court of appeals affirmed. *Totemoff v. State*, 866 P.2d 125 (Alaska App.1993). We granted Totemoff's petition for hearing.

We must first decide whether the State has criminal jurisdiction over Totemoff, as jurisdiction is a threshold issue which must be decided before this court can address other issues presented in an appeal. *See Nattrass*

v. State, 554 P.2d 399, 401 (Alaska 1976). Jurisdiction can be established either by finding that the State has the power to apply the spotlighting ban to subsistence hunters on federal land, or by determining that the State has exclusive jurisdiction over the navigable waters from which Totemoff fired his rifle. If we find that the State does have jurisdiction, we will then consider Totemoff's state law challenge to the anti-spotlighting regulation.

I. *JURISDICTION OVER FEDERAL LAND*

A state is free to enforce its civil or criminal laws on federal land within its boundaries unless the state consents to the exercise of exclusive federal jurisdiction, the state voluntarily cedes exclusive jurisdiction to the federal government, or the state's laws are preempted by federal law. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580-81, 107 S.Ct. 1419, 1424-25, 94 L.Ed.2d 577 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 542-43, 96 S.Ct. 2285, 2293-94, 49 L.Ed.2d 34 (1976); *see also Arizona v. Manypenny*, 445 F.Supp. 1123, 1125-26 (D.Ariz.1977), *rev'd on other grounds*, 451 U.S. 232, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981). Alaska has not voluntarily ceded exclusive jurisdiction over hunting on federal land to the federal government or consented to exclusive federal control. Therefore, the State lacks jurisdiction to enforce its spotlighting ban against subsistence hunters on federal land only if enforcement is preempted by federal law.

Federal law can preempt state law in three ways. First, Congress may expressly declare that state law is preempted. Second, state law is preempted if Congress

intends the federal government to occupy a field exclusively. Third, federal law preempts state law if the two actually conflict. *See, e.g., Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604-05, 111 S.Ct. 2476, 2481-82, 115 L.Ed.2d 532 (1991); *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2274-75, 110 L.Ed.2d 65 (1990). Totemoff argues that application of the spotlighting ban to him is preempted by the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101-3233 (1988).

No provision in ANILCA expressly preempts state enforcement of state hunting laws against subsistence hunters on federal land. Thus, we must determine whether Congress intended for the federal government to exclusively occupy the field of regulation of subsistence activities when it enacted ANILCA, or whether state law actually conflicts with ANILCA.

A. *Intent to Occupy Field*

Congressional intent to occupy a field can be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it," or if a federal law "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English*, 496 U.S. at 79, 110 S.Ct. at 2275 (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

However, " '[w]here . . . the field which Congress is said to have pre-empted' includes areas that have 'been

traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' " *Id.* (alteration in original) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)). "When considering pre-emption, '[courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Mortier*, 501 U.S. at 605, 111 S.Ct. at 2478 (quoting *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152).

Regulation of hunting is an area that has been traditionally occupied by the states. It is part of the historic police power of states. *See State v. Coffee*, 97 Idaho 905, 914, 556 P.2d 1185, 1194 (1976); *State ex rel. Nepstad v. Danielson*, 149 Mont. 438, 427 P.2d 689, 691 (1967); *see also Montana v. United States*, 450 U.S. 544, 564 n. 13, 101 S.Ct. 1245, 1258 n. 13, 67 L.Ed.2d 493 (1981). Therefore, we may find that Congress intended to occupy the field of regulation of subsistence hunting on federal land only if Congress' purpose was clear and manifest.

ANILCA does not disclose such a clear and manifest purpose. Title VIII of ANILCA governs subsistence hunting and fishing. 16 U.S.C. §§ 3111-26. Section 804 of Title VIII requires the taking of fish and wildlife on public lands for subsistence purposes to be accorded priority over the taking of fish and wildlife for other purposes. 16 U.S.C. § 3114. Section 802 states that it is the purpose of Congress "to provide the opportunity for rural residents engaged in a subsistence way of life to do so." 16 U.S.C. § 3112(1). Section 814 requires the Secretaries of Interior and Agriculture to promulgate regulations necessary to carry out their responsibilities under Title VIII. 16 U.S.C.

§ 3124. Sections 805(a)-(c) of Title VIII provide for the establishment of a network of regional advisory councils and local advisory committees to advise the Secretaries in the exercise of their authority under ANILCA. 16 U.S.C. §§ 3115(a)-(c).

Under § 805(d), the federal government was not to implement §§ 805(a)-(c) if Alaska enacted laws of general applicability providing "for the definition, preference, and participation specified" in Title VIII. 16 U.S.C. § 3115(d). Alaska did enact such laws,[1] but we struck down the rural preference provision of those laws as contrary to the Alaska Constitution in *McDowell v. State*, 785 P.2d 1 (Alaska 1989). As a result, the State fell out of compliance with ANILCA. The federal government subsequently promulgated temporary and then permanent regulations governing subsistence hunting on public land and implementing §§ 805(a)-(c) of Title VIII. 55 Fed.Reg. 27,114 (1990); 57 Fed.Reg. 22,940 (1992).

Even though Title VIII has been fully implemented, it does not create a scheme of federal regulation so pervasive that there is no room for state regulation to supplement it. Under Title VIII, the Secretaries of Interior and Agriculture implement ANILCA's subsistence priority and opportunity provisions with the participation and assistance of local and regional advisory councils. This does not foreclose the State from promulgating hunting and fishing regulations which may affect subsistence hunters on federal land, so long as those regulations do not conflict with federal laws or regulations. Nothing in

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[1] *See* ch. 151, SLA 1978; ch. 52, SLA 1986.

Title VIII discloses a clear and manifest purpose to prohibit all state regulation of subsistence hunting. Nothing affirmatively prohibits the State from engaging in such regulation.

Moreover, § 1314 of ANILCA states, "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in [Title VIII] of this chapter." 16 U.S.C. § 3202. Again, no provision in Title VIII clearly and manifestly prevents the State from enforcing its general hunting laws against subsistence hunters on federal land.

In addition, § 802(3) of Title VIII provides that the policy of Congress is that "[f]ederal land managing agencies, in managing subsistence activities on the public lands . . . shall cooperate with . . . appropriate State and Federal agencies." 16 U.S.C. § 3112(3). This section suggests that Congress did not intend a federal regulatory scheme so pervasive that there would be no room for state regulation to supplement it.

Finally, when the federal regulations promulgated pursuant to ANILCA were passed, the federal agencies administering ANILCA explained that the regulations would permit the State to continue to participate in the management of subsistence hunting on public land:

> *[T]hese regulations anticipate an interactive process between the State fish and game regulatory procedure.* The State, because of its constitution, cannot provide a preference for rural residents with customary and traditional use of fish and wildlife as required by ANILCA. *The State can facilitate harvest by rural residents through various*

> *regulations dealing with means and methods of take and perhaps other mechanisms.*
>
> *If State regulations allow rural residents the opportunity to obtain their customary and traditional take and uses of fish and wildlife resources, the Federal regulations may closely parallel State regulations.*
>
> *The Federal program anticipates a highly cooperative, interactive relationship with the State system.* To the extent that cooperation exists, the Federal program will be able to minimize change to traditional State regulation and management of fish and wildlife.

55 Fed.Reg. 27,114, 27,119 (1990) (emphasis added). Thus, the federal government clearly contemplated that Alaska means and methods regulations, the kinds of regulations at issue in this case, would be effective on federal land.

Since the language of ANILCA does not demonstrate a clear and manifest Congressional intent to preempt all state regulation affecting subsistence hunting and fishing on federal land, and since the federal agencies administering ANILCA have interpreted ANILCA as allowing such state regulation, we hold that Congress did not intend for the federal government to exclusively occupy the field of subsistence hunting and fishing regulation.

B. *Actual Conflict*

We must next decide whether federal law actually conflicts with the enforcement of the state spotlighting ban against Totemoff on federal land. There is no direct conflict between Alaska's anti-spotlighting regulation, 5 AAC 92.080(7), and any federal statute or regulation. At

the time of Totemoff's arrest, a federal subsistence hunting regulation virtually identical to the state regulation prohibited taking game with the aid of a spotlight. *Compare* 36 C.F.R. § 242.23(b)(1)(vii) (1990) with 5 AAC 92.080(7) (1990).

Totemoff's principal federal claim, however, is that federal law preempts application of the state spotlighting ban to him because federal law allows him to defend against prosecution on the grounds that spotlighting is a customary and traditional method of taking deer, while state law does not permit such a defense.[2] Totemoff relies on *United States v. Alexander*, 938 F.2d 942 (9th Cir.1991).

In *Alexander*, the defendants sold herring roe in violation of an Alaska regulation prohibiting sale of herring roe. *Id.* at 944-45. The court held that the defendants were permitted to defend against criminal prosecution on the basis that they were engaged in customary trade for subsistence purposes, a subsistence use protected by ANILCA. *Id.* at 948. In deciding that customary trade was protected by ANILCA, the court cited ANILCA's definition of "subsistence uses" – "the customary and traditional uses by rural Alaska residents of wild renewable resources . . . for barter, or sharing for personal or family consumption; *and for customary trade.*" *Id.* at 946 (alteration in original).

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[2] In *State v. Morry*, 836 P.2d 358, 370 (Alaska 1992), we held that the Boards of Fish and Game "have the discretion, but are not mandated, to take into consideration the traditional and customary methods of subsistence takings in their formulation of subsistence regulations." (Emphasis added.)

The full text of ANILCA's definition of "subsistence uses" is:

> [T]he customary and traditional *uses* by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

ANILCA § 803, 16 U.S.C. § 3113 (emphasis added). This definition only covers various uses of subsistence resources. It does not cover traditional means and methods of hunting. And no other provision in ANILCA creates a general right to use traditional means and methods of taking game.

Title VIII of ANILCA does specifically protect the use of traditional means of surface transportation for subsistence hunting. Section 811(b) of Title VIII states, "Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation." 16 U.S.C. § 3121(b). The protection of traditionally employed surface transportation methods implies that other traditional components of subsistence hunting or fishing, such as the use of certain guns, nets, or other equipment, are not exempt from state regulation.

Furthermore, numerous provisions in ANILCA require regulation of subsistence taking in accordance with sound wildlife management principles and the preservation of wildlife resources. *See* 16 U.S.C. §§ 3101(b), 3101(c), 3111(3), 3112(1), 3125(1). Restriction of traditional means and methods may be necessary to accomplish this goal. *See* ANILCA § 801(3), 16 U.S.C. § 3111(3) ("continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened . . . by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management").

In addition, no case law directly holds that ANILCA protects customary and traditional methods of hunting. There is a case, however, which could provide support for such a holding, *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir.1994). In *Quinhagak*, the court ruled that several native villages were entitled to a preliminary injunction against the enforcement of an Alaska regulation barring the taking of rainbow trout for subsistence purposes. *Id.* at 395. The court held that the villages presented a showing of hardship sufficient to justify the preliminary injunction, since they demonstrated that rainbow trout was an important food source for them. *Id.* at 393. The court then added:

> The Villages also presented evidence that the federal and state regulations interfere with their way of life and cultural identity. . . . They needed to prove nothing more in light of the clear congressional directive to protect the cultural aspects of subsistence living. 16 U.S.C. § 3111(1) [ANILCA § 801(1)] ("[T]he continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is *essential to Native*

> physical, economic, traditional, and cultural existence. . . . ").

Id. at 394 (alteration in original).

It might be inferred from this language that ANILCA protects traditional subsistence taking means and methods which are part of the cultural identity and way of life of Natives. However, *Quinhagak* only held that the villages were entitled to a preliminary injunction and did not resolve the merits of any controversy concerning the interpretation of ANILCA. Though an argument can be made based on *Quinhagak* that ANILCA does protect customary and traditional means and methods, we conclude that more weight should be accorded to Congress' failure to mention means and methods in ANILCA's definition of "subsistence uses" and to Congress' specific grant of protection to traditional means of surface transportation.

We hold that ANILCA does not protect the use of a spotlight as a customary and traditional method of subsistence hunting, and thus there is no actual conflict between ANILCA and Alaska law. Therefore, federal law does not preempt enforcement of Alaska's spotlighting ban against subsistence hunters on federal land, and the State does have jurisdiction over Totemoff.

II. *JURISDICTION OVER NAVIGABLE WATERS*

Even if ANILCA does protect customary and traditional means and methods, thereby preempting state enforcement of the anti-spotlighting regulation against Totemoff on federal land, the State still has criminal jurisdiction if ANILCA does not apply to the navigable waters

from which Totemoff shined his spotlight at the deer. Totemoff's conduct of taking a deer with the aid of an artificial light was committed partly in navigable waters and partly on federal land. If the elements of a crime are committed in different jurisdictions, "any state in which an essential part of the crime is committed" may assert jurisdiction. *State v. Scofield*, 7 Ariz.App. 307, 315, 438 P.2d 776, 784 (1968). "If an offense is committed partly on federal and partly on non-federal property, both sovereigns have jurisdiction." *State v. Kirksey*, 647 S.W.2d 799, 804 (Mo.1983) (en banc).

See also Lane v. State, 388 So.2d 1022, 1028 (Fla.1980) (though fatal blow struck in Alabama, Florida has jurisdiction over murder if either premeditation to murder or felony underlying murder occurred in Florida); *Commonwealth v. Lanoue*, 326 Mass. 559, 95 N.E.2d 925, 926 (1950) (if a criminal act is committed in two jurisdictions, a state has jurisdiction over the act if the part of the act committed within that state has been declared to be punishable by its laws); *State v. Kills on Top*, 243 Mont. 56, 793 P.2d 1273, 1285-86 (1990) (Montana has jurisdiction over felony-murder even though victim killed in Wyoming because underlying felony, kidnapping, occurred in Montana), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); *People v. Fuller*, 185 A.D.2d 446, 586 N.Y.S.2d 366, 367-68 (App.) (New York has jurisdiction over rape defendant, even though actual sexual assault may have taken place in Pennsylvania, because element of forcible compulsion occurred in New York), *appeal denied*, 80 N.Y.2d 974, 591 N.Y.S.2d 144, 605 N.E.2d 880 (1992); *Brown v. Market Dev., Inc.*, 41 Ohio Misc. 57, 322

N.E.2d 367, 372 (Ohio C.P.1974) (Ohio would have jurisdiction over a person who stood in Ohio and fired a shot across the state border, killing someone in Indiana). *But see State v. Hall*, 114 N.C. 909, 19 S.E. 602, 604-05 (1894) (North Carolina did not have jurisdiction over defendant who while standing in North Carolina shot victim in Tennessee, since no North Carolina statute criminalized the conduct which occurred in North Carolina or otherwise conferred jurisdiction upon the state).

In this case, Totemoff's act of shining a spotlight and firing the fatal shot, an essential part of the crime with which he was charged, unlawful taking of game, occurred on navigable waters. Moreover, Alaska law specifically criminalizes conduct which Totemoff committed solely on navigable waters. Alaska Statute 16.05.940(33) defines "take" as "taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game." Totemoff took actions in navigable waters which constitute "pursuing," "hunting," "disturbing," and "attempting to take, pursue, hunt . . . or in any manner capture or kill" deer. Therefore, the State has jurisdiction over Totemoff, even if ANILCA preempts the application of the spotlighting ban on federal land, so long as ANILCA does not give the federal government the power to regulate hunting and fishing in navigable waters.

ANILCA's subsistence priority applies only to "public lands." ANILCA § 804, 16 U.S.C. § 3114. Section 102 of ANILCA defines the term "public lands":

> (1) The term "land" means lands, waters, and interests therein.
>
> (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.
>
> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except –
>
> > (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law.

16 U.S.C. § 3102. Thus, "public lands" means lands, waters, and interests therein, the title to which is in the United States. But "public lands" does not include lands, waters, and interests therein which were transferred to Alaska under other federal laws.

Whether "public lands" includes navigable waters was the subject of a recent Ninth Circuit decision, *Alaska v. Babbitt (Katie John)*, 54 F.3d 549 (9th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 272, ___ L.Ed.2d ___ (1995). The *Katie John* court considered whether ANILCA applies to navigable waters because of the federal government's navigational servitude or federal reserved water rights.

The navigational servitude is a dominant servitude, sometimes described as a "superior navigation easement," which allows the federal government to exercise its regulatory power over navigable waters in the interests of commerce without compensation for interference with private water rights. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28, 81 S.Ct. 784, 787-88, 5 L.Ed.2d 838 (1961); *Boone v. United States*, 944 F.2d 1489, 1493-94 (9th Cir.1991). The servitude "is a concept of power, not of property." *United States v. Certain Parcels of Land Situated in Valdez*, 666 F.2d 1236, 1238 (9th Cir.1982). It is a "dominant right over navigable waters for purposes of improving and regulating navigation." *United States v. 119.67 Acres of Land, More or Less, Situated in Plaquemines Parish, La.*, 663 F.2d 1328, 1330 n. 5 (5th Cir.1981). The navigational servitude is derived from the Commerce Clause. *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 704, 107 S.Ct. 1487, 1489-90, 94 L.Ed.2d 704 (1987); *Boone*, 944 F.2d at 1494 n. 9.

Under the reserved water rights doctrine, when Congress withdraws land from the public domain for a federal purpose, it implicitly reserves water necessary to accomplish the purposes of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir.), *cert. denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981). "The United States acquires a water right vesting on the date the reservation was created, and superior to the rights of subsequent appropriators." *Colville*, 647 F.2d at 46. The amount of water reserved under the doctrine is limited to what is necessary to fulfill the purpose of the land reservation.

Cappaert, 426 U.S. at 141, 96 S.Ct. at 2070-71; *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir.1983), *cert. denied*, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984).

A reservation of water may be implied only where the water is necessary for the primary purpose of the federal reservation, not where the water merely serves secondary purposes of the reservation. *United States v. New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978); *Adair*, 723 F.2d at 1408-09. In determining the scope of implied reserved water rights, a court may look only to the primary purpose of a reservation at the time the land was first reserved by the federal government, and may not consider other purposes later given to the reservation. *See New Mexico*, 438 U.S. at 713-15. The reserved water rights doctrine has at times been treated as giving the government only a non-consumptive right to prevent others from using a supply of water in a manner that would deprive the federal reservation of the water necessary for its primary purpose; at other times, the doctrine has been interpreted as giving the United States the right to a specific amount of water. *Compare Cappaert*, 426 U.S. at 135, 143, 96 S.Ct. at 2068, 2071-72 *and Adair*, 723 F.2d at 1411 *with Arizona v. California*, 373 U.S. 546, 600-01, 83 S.Ct. 1468, 1497-98, 10 L.Ed.2d 542 (1963) *and Colville*, 647 F.2d at 47.

The Ninth Circuit in *Katie John* decided that the navigational servitude is not an interest to which the United States holds title and ruled that the navigational servitude does not convert all Alaska navigable waters to "public lands" as defined in ANILCA. 54 F.3d at 553. In doing so, the court reversed a federal district court decision which held that the navigational servitude is an

interest to which the United States holds title for the purposes of ANILCA. *John v. United States*, Nos. A90-0484-CV, A92-0264-CV, 1994 WL 487830, at *17 (D.Alaska March 30, 1994). The Ninth Circuit also held in *Katie John* that reserved water rights are interests in land to which the federal government has title under ANILCA's definition of "public lands." 54 F.3d at 554.

We are not obliged to follow *Katie John*, since this court is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law. *In re F.P.*, 843 P.2d 1214, 1215 n. 1 (Alaska 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2441, 124 L.Ed.2d 659 (1993). Though the State was a party to *Katie John*, it is not collaterally estopped here as to the issues decided in that case because the applicability of ANILCA to navigable waters is a pure question of law which does not involve factual issues. *See State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 954 (Alaska 1995) ("the State is permitted to relitigate unmixed questions of law so long as the subject matter of the second case is 'substantially unrelated' to that of the first"). We will follow *Katie John* only to the extent that its reasoning is persuasive.

For a number of reasons, we find that neither the navigational servitude nor reserved water rights bring navigable waters within ANILCA's definition of "public lands," and that the federal government has no authority based on the navigational servitude or the reserved water rights doctrine to regulate hunting and fishing in Alaska's navigable waters.

First, even if the navigational servitude or reserved water rights can be considered interests to which the

United States holds title, the State has an interest in fish and wildlife located in navigable waters which precludes federal regulation of such fish and wildlife, under § 102(3)(A) of ANILCA and the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-56 (1988). Section 102(3)(A) of ANILCA exempts from the definition of "public lands" "lands which have been . . . granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). As ANILCA § 102(1) defines "land" as "lands, waters, and interests therein," 16 U.S.C. § 3102(1), "public lands" does not include lands, waters, and interests therein granted to Alaska under another federal law.

A relevant interest in lands or waters is granted to Alaska by the Submerged Lands Act of 1953. Section 3(a) of the Act states:

> It is hereby determined and declared to be in the public interest that (1) *title to and ownership of* the lands beneath navigable waters within the boundaries of the respective States, and *the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said* lands and *natural resources* all in accordance with applicable State law be, and they *are*, subject to the provisions hereof, *recognized, confirmed, established and vested in and assigned to the respective States* or the persons who were on June 5, 1950,[3] entitled thereto under the law of the

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[3] Under the Alaska Statehood Act, "[t]he Submerged Lands Act of 1953 [is] applicable to the State of Alaska and the said State [has] the same rights as do [other] States thereunder."

> respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.

43 U.S.C. § 1311(a) (emphasis added). Section 2(e) of the Act states, "[t]he term 'natural resources' includes . . . fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. § 1301(e).

The Submerged Lands Act thus gives Alaska ownership of, title to, and management power over the following: lands beneath the navigable waters of Alaska,[4] the navigable waters themselves,[5] and fish and other marine life located in Alaska's navigable waters. Under § 102(3)(A) of ANILCA, the definition of "public lands" in ANILCA therefore excludes navigable waters.

Pub.L. No. 85-508, § 6(m) (1958), *reprinted in* 48 U.S.C. following § 5 (1988).

[4] The term "lands beneath navigable waters" covers

> all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles.

43 U.S.C. § 1301(a)(2).

[5] The U.S. Supreme Court has referred to the Submerged Lands Act as a grant of "submerged lands and waters." *United States v. California*, 436 U.S. 32, 37, 98 S.Ct. 1662, 1665, 56 L.Ed.2d 94 (1978).

Furthermore, § 6(a) of the Submerged Lands Act specifically precludes the navigational servitude from being used to give the federal government power over fish or animals in state navigable waters. The section states:

> The United States retains all its *navigational servitude and rights in* and powers of regulation and control of said lands and *navigable waters* for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but *shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of* the lands and *natural resources which are specifically* recognized, confirmed, established, and *vested in* and assigned to the respective *States* and others *by section [3]* of this [Act].

43 U.S.C. § 1314(a) (emphasis added). Under this statute, the navigational servitude and other federal rights in navigable waters cannot give the federal government ownership of navigable waters or management rights over fish and animals in navigable waters, as those rights are reserved to the states by § 3 of the Submerged Lands Act.

The second reason supporting our decision that ANILCA does not give the federal government power to regulate hunting and fishing in navigable waters is that the navigational servitude and reserved water rights are not the type of property interests to which title can be held. Authorities disagree on whether the term "title" applies only to fee ownership of property or also covers lesser possessory interests such as lease interests. *Dover*

Veterans Council, Inc. v. City of Dover, 119 N.H. 738, 407 A.2d 1195, 1196 (1979); *see also United States v. Hunter*, 21 F. 615, 617 (C.C.E.D.Mo.1884); *compare United States v. City of New Brunswick*, 11 F.2d 476, 477 (3d Cir.1926) ("the ownership of title means ownership of property"), *rev'd on other grounds*, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693 (1928) *and Schaible v. Fairbanks Medical & Surgical Clinic, Inc.*, 531 P.2d 1252, 1260 (Alaska 1975) (conventional definition of "title" is ownership of the premises) with *Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183, 189 (1963) ("title" signifies actual or constructive possession of property or the right to possession) *and East Norriton Medical Assocs., Ltd. v. Commonwealth*, 168 Pa.Cmwlth. 421, 650 A.2d 1169, 1171 (1994) (cites statute which defines "title" as a possessory or leasehold interest). However, it is generally accepted that "title" signifies at least some sort of possessory interest in property and does not include lesser interests such as easements. *See Kohl Indus. Park Co. v. County of Rockland*, 710 F.2d 895, 903 (2d Cir.1983).

Neither the navigational servitude nor reserved water rights are possessory interests in a body of water. The navigational servitude has been described as a "dominant servitude" and as a "superior navigation easement." *Virginia Elec. & Power*, 365 U.S. at 627, 81 S.Ct. at 787. Reserved water rights give the federal government the right to prevent others from appropriating water or to use a certain volume of water, not to possess a body of water. *See Cappaert*, 426 U.S. at 135, 143, 96 S.Ct. at 2068, 2071-72; *Arizona*, 373 U.S. at 600-01, 83 S.Ct. at 1497-98. Therefore, the United States cannot hold title to the navigational servitude or reserved water rights.

A similar conclusion was reached by a New York court when New York State claimed that it had title to submerged lands by virtue of state interests analogous to the federal navigational servitude and federal reserved water rights. In *Niagara Falls Power Co. v. Water Power & Control Commission*, 237 A.D. 216, 262 N.Y.S. 217, 219-221 (N.Y.App.1932), *rev'd on other grounds*, 267 N.Y. 265, 196 N.E. 51 (N.Y.), *cert. denied*, 296 U.S. 609, 56 S.Ct. 128, 80 L.Ed. 432 (1935), an issue relevant to determining the amount of rent the state could charge for a water power site located on submerged lands which had been previously granted to a private company was whether "title" to the "water power sites or lands" was "vested in the state." The state argued that it had "title" through "[i]ts sovereignty and incidental control over navigable waters," a power similar to the federal navigational servitude, or through interference the power site could cause with state riparian rights appurtenant to a state park, an interest similar to federal reserved water rights. *Id.* at 221. The court rejected these arguments, explaining that these "inchoate and incorporeal" rights did not constitute "title." *Id.* at 224-25.

Our conclusion that the navigational servitude and reserved water rights are not interests to which the United States holds title may raise the question of what Congress intended when it included "interests" in "lands" or "waters," "the title to which is in the United States," within ANILCA's definition of "public lands." *See* ANILCA §§ 102(1)-(3), 16 U.S.C. §§ 3102(1)-(3). A logical answer is that the word "interests" was intended to cover possessory interests lesser than fee interests such as leases, as there is considerable authority that title can

be held to such interests. *See, e.g., Shingleton,* 133 S.E.2d at 189; *East Norriton,* 650 A.2d at 1171.

A broader reading would conflict with the clear statement doctrine, which is the third ground underlying our ruling on the navigable waters issue. The clear statement doctrine "counsels that a . . . court should not apply a federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area." *H.J. Inc. v. Northwestern Bell Tel. Co.,* 954 F.2d 485, 495 n. 6 (8th Cir.) (quoting *Taffet v. Southern Co.,* 930 F.2d 847, 851 (11th Cir.1991), *vacated on other grounds and reh'g granted,* 958 F.2d 1514 (11th Cir.), *on reh'g en banc,* 967 F.2d 1483 (11th Cir.), *cert. denied,* ___ U.S. ___, 113 S.Ct. 657, 121 L.Ed.2d 583 (1992)), *cert. denied,* 504 U.S. 957, 112 S.Ct. 2306, 119 L.Ed.2d 228 (1992). The doctrine means that "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *California State Bd. of Optometry v. Federal Trade Comm'n,* 910 F.2d 976, 981 (D.C.Cir.1990) (quoting *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 65, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989)); *see also BFP v. Resolution Trust Corp.,* ___ U.S. ___, ___, ___, 114 S.Ct. 1757, 1764-66, 128 L.Ed.2d 556 (1994). The doctrine applies "in circumstances in which the language of a statute or its legislative history provide some indication of ambiguity." *County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1306 (2d Cir.1990).

In this case, ANILCA's definition of "public lands" would have to be viewed as ambiguous before it could be interpreted as covering the navigational servitude or reserved water rights. Defining "public lands" as waters subject to the navigational servitude or reserved water rights would allow the federal government to regulate hunting and fishing in navigable waters. States have traditionally had the power to govern hunting and fishing in their navigable waters. Regulation of hunting and fishing is a traditional concern of the states. *See Coffee*, 556 P.2d at 1194; *Danielson*, 427 P.2d at 691. Congress has not expressed in unmistakably clear language a desire to alter this traditional allocation of state and federal power.

The fourth basis for our decision on this matter is that, even assuming the navigational servitude or reserved water rights are interests to which the United States holds title, the land management authority which the federal government obtains through these interests is limited by the purposes of the interests. The power any easement, servitude, or similar property interest gives to its holder is limited by the interest's purpose. *See, e.g., Southern Pac. Co. v. City of San Francisco*, 62 Cal.2d 50, 41 Cal.Rptr. 79, 396 P.2d 383, 386 (1964); *Benno v. Central Lake County Joint Action Water Agency*, 242 Ill.App.3d 306, 182 Ill.Dec. 522, 526, 609 N.E.2d 1056, 1060 (Ill.App.), *appeal denied*, 151 Ill.2d 561, 186 Ill.Dec. 378, 616 N.E.2d 331 (1993). For example, an easement giving a person the right to cross over another's property for access to his own land does not create a right to use the property subject to the easement for any other purpose.

Likewise, the navigational servitude only gives the United States the power to regulate navigable waters for

navigation purposes without owing compensation, *Boone*, 944 F.2d at 1493-94; it does not permit federal regulation of hunting and fishing in navigable waters. Similarly, the reserved water rights doctrine only grants to the government the right to either exclude others from appropriating water which feeds a government reservation or to use a limited volume of water in order to serve the federal land reserved. *See Cappaert*, 426 U.S. at 135, 143, 96 S.Ct. at 2068, 2071-72; *Arizona*, 373 U.S. at 600-01, 83 S.Ct. at 1497-98. The doctrine does not provide the federal government with plenary power over a body of water.

Fifth, neither the navigational servitude power to regulate for navigation purposes nor the power to reserve water rights can grant the federal government jurisdiction to manage hunting and fishing in navigable waters. The two powers are over navigation and water, not fish and game.

The final reason for our ruling on the navigable waters issue concerns reserved water rights only. Employing the reserved water rights doctrine to define the geographic scope of navigable waters covered by ANILCA would be highly impractical, perhaps even impossible. It would first require the federal agencies administering ANILCA to determine the primary purpose of each federal land reservation in Alaska at the time the reservation was created. *See New Mexico*, 438 U.S. at 702, 713-15, 98 S.Ct. at 3015, 3020-22. Then, the federal agencies would have to ascertain the amount of water necessary to fulfill the primary purpose of the reservation. *See Cappaert*, 426 U.S. at 141, 96 S.Ct. at 2070. Afterwards, the agencies would have to somehow convert that amount of water into a surface area of water constituting

"public lands" under ANILCA. This last step could be especially difficult, because reserved water rights represent the right to use a set volume of water or to prevent others from appropriating water, and not specific geographic areas around which property lines may be drawn. Congress could not have intended to create such a complicated and uncertain regulatory scheme.

Despite acknowledging that it was "impos[ing] an extraordinary administrative burden on federal agencies," the Ninth Circuit held in *Katie John* that reserved water rights are interests in land to which the federal government has title for ANILCA purposes. 54 F.3d at 554. The court's holding was based on two grounds. First, the court believed that the position taken by the federal agencies that reserved water rights do define the scope of ANILCA was a reasonable agency interpretation owed deference. *See id.* at 552-54. Second, the court feared undermining Congress' intent to protect subsistence fishing. *See id.* at 552, 554. In our view, neither of these considerations justifies the court's holding.

We apply federal law on deference in determining whether deference is owed to a federal agency's legal position. Under federal deference law, the Katie John court should not have deferred to the federal agencies' position on the meaning of ANILCA's definition of "public lands." *See id.* at 554. This position was first adopted by the federal government at oral argument before the district court. *Id.* at 552. Prior to that, the federal regulations promulgated pursuant to ANILCA and the explanations of those regulations had repeatedly generally excluded navigable waters from the definition of "public lands." *See* 36 C.F.R. § 242.3(b) (1994); 57 Fed.Reg. 22,940,

22,941 (1992); 56 Fed.Reg. 29,310, 29,311 (1991); 55 Fed.Reg. 27,114, 27,115 (1990).[6]

The federal government's new position that ANILCA covers navigable waters in which the United States has reserved water rights is a position taken during litigation, not a regulation or agency interpretation that is owed deference. The federal government's new position has not been formalized in any regulation. *See* 60 Fed.Reg. 31,542, 31,542-43 (1995). Positions on interpretations of statutes adopted by agencies during litigation which contradict earlier regulations are not owed deference by courts. *See Wolpaw v. Commissioner*, 47 F.3d 787, 790 (6th Cir.1995) (position announced by federal agency in the course of litigation owed no deference). If any interpretation is owed deference, it is the interpretation in the federal regulations that ANILCA generally does not apply to navigable waters, not the position adopted in a litigation context. *See id.* (while litigation position not owed deference, agency's earlier regulations may be entitled to some deference); *see also General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-46, 97 S.Ct. 401, 411-13, 50 L.Ed.2d 343 (1976) (Court refuses to defer to agency interpretation contradicting previous, long-standing interpretation and follows earlier interpretation).

Deference is not due to the new federal position for several other reasons. The definition of "public lands"

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[6] Certain navigable waters over submerged lands to which the United States holds title were included in the definition of "public lands." *See* 36 C.F.R. 242.3(b); 57 Fed.Reg. 22,940, 22,941 (1992).

under ANILCA is a pure question of statutory construction. *See Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 445-46, 107 S.Ct. 1207, 1220-21, 94 L.Ed.2d 434 (1987) (suggesting that no deference or lesser degree of deference is due to agency interpretation if issue before court is pure question of statutory construction). The issue involves no technical agency expertise. *See Thomas Jefferson Univ. v. Shalala*, ___ U.S. ___, ___, 114 S.Ct. 2381, 2387, 129 L.Ed.2d 405 (1994) (deference more warranted when interpretation involves technical agency expertise). The federal agencies' position is not a longstanding one. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 646 n. 34, 106 S.Ct. 2101, 2122 n. 34, 90 L.Ed.2d 584 (1986) (if agency interpretation is neither consistent nor longstanding, the degree of deference it deserves is substantially diminished). Most importantly, the recent federal interpretation is not a reasonable, permissible construction of ANILCA, for the numerous reasons given earlier. *See National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418, 112 S.Ct. 1394, 1402, 118 L.Ed.2d 52 (1992) ("a reviewing court need not accept an interpretation which is unreasonable"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984) (deference may be given to agency interpretation only if it is based on permissible construction of statute).

We also respectfully disagree with the conclusion of the court in *Katie John* that utilizing reserved water rights to define the scope of ANILCA is necessary to fulfill Congress' intent to protect subsistence fishing. The court

noted that Congress intended ANILCA to protect subsistence uses, that subsistence uses include subsistence fishing, and that subsistence fishing has traditionally taken place in navigable waters. 54 F.3d at 552. The court then stated, "Thus, we have no doubt that Congress intended that public lands include at least some navigable waters." *Id.* The court later stated that ruling that neither the navigational servitude nor reserved water rights constitute interests to which the United States holds title for ANILCA purposes "would undermine congressional intent to protect and provide the opportunity for subsistence fishing." *Id.* at 554.

However, the definition of "public lands" in the federal regulations issued pursuant to ANILCA does include navigable waters over submerged lands owned by the United States. *See* 36 C.F.R. § 242.3(b); 57 Fed.Reg. 22,940, 22,941 (1992).[7] Moreover, some subsistence fishing takes place in non-navigable waters which are "public lands." *See, e.g., Quinhagak,* 35 F.3d at 391. Therefore, fulfilling Congress' intent to provide an opportunity for subsistence fishing does not require ruling that reserved water rights define "public lands" under ANILCA.

Because the Submerged Lands Act of 1953 specifically gives states authority over fish and animals in navigable waters and precludes the navigational servitude or reserved water rights from being used to erode

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[7] The area encompassed in the regulation defining ANILCA's scope is substantial. It includes, to name only the largest areas, the Arctic Ocean watershed from the Canadian border to Cape Lisbourne on the Chukchi Sea, and virtually all of the Aleutian Islands. *See* 36 C.F.R. § 242.3(b)(1), (4).

that authority, because the navigational servitude and reserved water rights are not interests to which title can be held, because of the clear statement doctrine, because the navigational servitude and reserved water rights are limited interests which do not give the federal government power over navigable or reserved waters unrelated to those interests, and for the other reasons discussed above, we hold that navigable waters are generally not "public lands" under ANILCA. Therefore, ANILCA does not curtail the State's authority to regulate hunting and fishing in navigable waters, and the State has criminal jurisdiction over Totemoff.

III. *VALIDITY OF REGULATION*

As the State has the right to prosecute Totemoff, we proceed to consider his state law defense. Totemoff argues that the regulation prohibiting spotlighting is invalid because the Board of Game failed to consider the impact of the regulation on subsistence hunting at its adoption. Both the district court and the court of appeals held that *State v. Eluska*, 724 P.2d 514 (Alaska 1986), prohibited Totemoff from challenging the regulation in a criminal proceeding. *See Totemoff*, 866 P.2d at 129. In addition, the State argues that AS 16.05.259, a statute entitled "No Subsistence Defense," prevents Totemoff from challenging the regulation.

A. *Eluska*

Both lower courts misinterpreted *Eluska*. In that case, Eluska, the defendant, killed a deer out of season. There were no subsistence regulations separate from the general

hunting regulations. Eluska defended against prosecution on the grounds that he was hunting for subsistence purposes, that the Board had violated its statutory duty to adopt subsistence regulations, and that therefore his actions were lawful. 724 P.2d at 514. The court of appeals accepted his defense. The court held that Alaska law gave subsistence users a right to hunt for subsistence purposes. The court ruled that in areas where the Board of Game failed to adopt regulations permitting subsistence hunting, a person charged with violating hunting laws could defend on the basis that he was hunting for subsistence. *Id.* at 515.

We reversed, citing AS 16.05.920(a), which prohibits taking any game unless permitted by statute or regulation. We observed that no Alaska statute or constitutional provision gave persons the right to hunt for subsistence in the absence of regulations authorizing such hunting, and noted that the decision of the court of appeals would have permitted unregulated hunting in areas where the Board failed to adopt regulations authorizing subsistence hunting. *Id.* We cited one of our earlier decisions, *United States Smelting, Refining & Mining Co. v. Local Boundary Commission*, 489 P.2d 140 (Alaska 1971), explaining that the case held that "agency action taken without first complying with a statutory requirement may be invalid," not that "an agency's failure to act in accordance with a statutory requirement means that those who are regulated by the agency may act as though they were not regulated." *Eluska*, 724 P.2d at 516.

Eluska only held that a person may not hunt for subsistence purposes without regulations authorizing the person to do so. It did not rule that a subsistence hunter

may not defend against criminal prosecution on the grounds that the regulation the hunter is charged with violating is procedurally invalid. Unlike the defendant in *Eluska*, Totemoff disputes the validity of a specific regulation. Therefore, we hold that *Eluska* does not bar Totemoff's defense.

B. *Alaska Statute 16.05.259*

After the court of appeals' decision in *Eluska* was announced, but before we published our decision in the case, the legislature adopted AS 16.05.259. *See Bobby v. Alaska*, 718 F.Supp. 764, 785 (D.Alaska 1989). Alaska Statute 16.05.259 states, "In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses."

Arguing that AS 16.05.259 prohibits Totemoff from challenging the spotlighting ban, the State relies on a passage from a Senate Committee on Resources report on the legislation which contained AS 16.05.259. In its entirety, that passage reads:

> [Alaska Statute 16.05.259] states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. *This section requires a person who disagrees with a board action or statute to seek to correct that action or statute through appeal, petitions for reconsideration, court action, etc. rather than permitting the person to violate the statute or regulation and claim subsistence as a defense. This*

eliminates the "subsistence defense" as arose in the Eluska and Skuse[8] *cases.*

This section does not effect [sic] AS 16.05.930(b) which allows people to take fish and game in case of emergency. *This section is also not intended to limit a persons [sic] ability to challenge a regulation that is unreasonable in its terms or fails to provide a reasonable opportunity to satisfy subsistence uses as required in proposed AS 16.05.258(c).* An example might be a hunting season on caribou that was open in a particular area before or after the caribou migrated through the area, but was closed while the caribou were in the area. Such a regulation would be unreasonable on its face and would fail to provide a reasonable opportunity for subsistence uses as required by AS 16.05.258(c).

Senate Committee on Resources, *RE: SCS for CS for HB 288 (Resources) "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date"* 8-9 (March 12, 1986) (emphasis added). The report shows that AS 16.05.259 was designed to undo the court of appeals' decision in *Eluska*.

However, the report is also somewhat contradictory. It first states that the law requires a person who disagrees with a Board action to seek to correct that action through

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[8] *State v. Skuse*, No. 3KNS-85-1111 Cr. (Alaska Dist.Ct., January 17, 1986), was a district court decision similar to the court of appeals' decision in *Eluska*. In *Skuse*, the defendant was fishing for subsistence in an area where no regulation permitted subsistence fishing. Slip op. at 6. The court accepted the defendant's subsistence defense and granted his motion for prejudgment acquittal. *Id.* at 7.

administrative means, not a challenge in a criminal prosecution. It then states that it does not prohibit a person from contesting a regulation in a criminal proceeding on the basis that the regulation is unreasonable or fails to provide a reasonable opportunity to satisfy subsistence uses.

These contradictory passages suggest that under AS 16.05.259 a subsistence hunter may challenge a regulation in a criminal case only on the grounds that the regulation is unreasonable or fails to provide an opportunity to satisfy subsistence needs, but not on other grounds. But such a reading cannot be justified by the plain language of the statute. Legislative history may not be used to legislate detailed rules that cannot be supported by a statute's explicit language. *Cf. Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629-30 (Fed.Cir.1989).

As the committee's report is not particularly helpful, we look to AS 16.05.259's language and to the fact that it was passed to undo the court of appeals' decision in *Eluska* in order to divine the statute's meaning. The plain language of AS 16.05.259 does not bar challenges to the validity of a regulation such as 5 AAC 92.080(7), which governs means or methods of subsistence hunting. The law simply states, "In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses." This only means, as we held in *Eluska*, that unauthorized hunting does not become lawful because it is subsistence hunting. The statute does not state that a subsistence hunter may not challenge the validity of a means or methods regulation under which the hunter is prosecuted.

Furthermore, deciding that a subsistence hunter may contest the validity of a regulation under which the hunter is prosecuted is consistent with a recent decision of ours, *State v. Palmer*, 882 P.2d 386 (Alaska 1994). The defendant in *Palmer* was charged with violating the bag limit in a regulation governing subsistence hunting of caribou. *Id.* at 386. We held that while part of the regulation may have been invalid, the defendant could be prosecuted because the potentially invalid portion of the regulation was severable from the portion of the regulation containing the bag limit. *Id.* at 389. No suggestion was made in *Palmer* that *Eluska* or AS 16.05.259 prohibited the defendant, a subsistence hunter, from challenging the regulation under which he was charged.

Since *Eluska* and AS 16.05.259 were intended only to prevent hunters who took game in the absence of any regulation authorizing them to do so from claiming a subsistence defense, we hold that neither *Eluska* nor AS 16.05.259 prohibit Totemoff from contesting the validity of the spotlighting ban.

C. *Board's Failure to Consider Impact on Subsistence*

We now reach the merits of Totemoff's challenge to the regulation. Totemoff argues that the regulation banning taking of game with the aid of an artificial light is not valid because the Board did not consider whether the regulation was appropriate for subsistence hunting when it was adopted. Totemoff's argument is based on former AS 16.05.258(c), which stated in relevant part: "The boards shall adopt . . . subsistence hunting regulations for each . . . population for which a harvestable portion is

determined to exist [consistent with sustained yield]." Under former AS 16.05.258(f), subsistence takings were "subject to reasonable regulation of seasons, catch or bag limits, and methods and means." In addition, AS 16.05.255 provides in relevant part:

> (a) The Board of Game may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for
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> . . . .
>
> (3) establishing the means and methods employed in the pursuit, capture, and transport of game . . . ;
>
> . . . .
>
> (10) regulating sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game.

As noted, the challenged regulation, 5 AAC 92.080(7), prohibits the taking of game with the use of an artificial light.[9] This prohibition applies statewide to both subsistence and general hunting. 5 AAC 92.001 states: "Except

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[9] 5 AAC 92.080 provides:

The following methods of taking game are prohibited:

(1) by shooting from, on, or across a highway;

(2) with the use of any poison, except with the written consent of the board;

(3) knowingly, or with reason to know, with the use of a helicopter in any manner, including transportation to, or from, the field of any unprocessed game or parts of game, any hunter or hunting gear, or any equipment used in the pursuit or retrieval of game; this paragraph does not apply to transportation of a hunter, hunting gear, or game

as specifically provided otherwise, the regulations in this chapter apply statewide to subsistence hunting, general hunting, and trapping, as applicable."

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during an emergency rescue operation in a life-threatening situation;

(4) unless otherwise provided in this chapter, from a mechanical vehicle, or from a motor-driven boat or snowmachine unless the motor has been completely shut off and the progress from the motor's power has ceased, except that a motor-driven boat may be used to take caribou in Units 23 and 26, a snowmachine may be used to take caribou in Unit 23, and a motorized vehicle may be used to take game as described in (10) of this section;

(5) with the use of an aircraft, snowmachine, motor-driven boat, or other motorized vehicle for the purpose of driving, herding, or molesting game;

(6) with the use or aid of a machine gun, set gun, or a shotgun larger than 10 gauge;

(7) with the aid of a pit, fire, artificial light, radio communication, artificial salt lick, explosive, barbed arrow, bomb, smoke, chemical, or a conventional steel trap with a jaw spread over nine inches; however, the "conibear" style trap with a jaw spread of less than 11 inches may be used;

(8) with a snare, except for taking an unclassified game animal, a furbearer, grouse, hare, or ptarmigan;

(10) from a motorized land vehicle; except that in those portions of Units 7 and 15 within the Kenai National Wildlife Refuge, a motorized land vehicle may be used to take game by a person with physical disabilities, as defined in AS 16.05.940, who requires a wheelchair for mobility, under authority of a permit issued by the department and in compliance with Kenai National Wildlife Refuge regulations.

Totemoff argues that the artificial light regulation is invalid because the Board of Game did not hold a hearing to determine whether the regulation was suitable for application to subsistence hunting. He argues that our decision in *State v. Morry*, 836 P.2d 358 (Alaska 1992), holds that the Board of Game must conduct "consistency hearings" to determine the suitability of means and methods prohibitions to subsistence hunting. The State, by contrast, argues that the regulation is presumed to have been validly enacted and nothing in the record rebuts this presumption. For the reasons that follow, we accept the State's argument and reject Totemoff's.

The procedures for adopting regulations are set forth in the Administrative Procedure Act (APA) at AS 44.62.180-.290. The APA requires that notice of the proposed adoption of a regulation be published and disseminated thirty days before adoption. AS 44.62.190. The notice must contain an informative summary. AS 44.62.200(3). On the date designated in the notice the agency must give each interested person "the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present them orally." AS 44.62.210(a).

Alaska Statute 44.62.100 provides that upon the filing of a certified copy of a regulation, rebuttable presumptions are created that "(1) it was duly adopted; (2) it was duly filed and made available for public inspection at the day and hour endorsed on it; [and] (3) all requirements of this chapter and the regulations relative to the regulation have been complied with."

Totemoff implies that our decision in Morry requires a hearing in addition to that called for in AS 44.62.210(a). We do not read that case so broadly. At issue in *Morry* were regulations applicable to brown bear hunting which required hunters, among other things, to purchase a numbered, nontransferable tag before hunting and to affix and keep the tag on the animal after it was killed, and sealing requirements mandating that the successful hunter keep the skin and skull of a bear and have a state official seal these parts. 836 P.2d at 360. By contrast, the regulations did not prohibit letting the bear meat rot in the field. *See id.* at 363.

The superior court in *Morry* invalidated these regulations. *Id.* at 361. On appeal we affirmed on two grounds. First, we accepted the appellees' argument that the regulations in question were trophy-hunting regulations not appropriate as subsistence hunting regulations and that the regulations thus violated former AS 16.05.258(c), which required the Board to adopt subsistence hunting regulations. *Id.* at 363-64. We stated concerning this point:

> In particular, we find compelling the following arguments which were advanced by Morry and Kwethluk:
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> > [w]hatever the 'noncommercial, customary and traditional uses' standard of the definition of 'subsistence uses' in AS 16.05.940(30) may mean, it is plainly related to non-trophy uses that are 'for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation,' for the 'making and selling' of handicrafts, and for 'customary trade, barter or sharing.' There

> is no hint that hunting for trophies is a subsistence use. . . .
>
> Many people, both residents of the state and non-residents, hunt grizzly bears for trophies and leave the meat at the kill site . . . But it is not a subsistence use, and plaintiffs have contended throughout that it is manifestly unreasonable to apply the regulatory regime designed to govern such trophy-hunting practices to the uses in those places, such as Kwethluk and Anaktuvuk Pass, where brown bears are hunted for the meat and raw materials.

Id. (alteration in original).

As an alternative reason for affirmance, we held that the regulations were adopted by the Board in violation of the Administrative Procedure Act. *Id.* at 364. The appellees had argued that there never was an "APA rulemaking hearing, which would have provided a record demonstrating careful consideration of the applicable subsistence laws." *Id.* at 363. The State did not directly address this contention and thus made no effort to refute it. *Id.* We accepted it as a fact that "no hearing was ever held." *Id.* at 364.

Our conclusion in *Morry* that the regulations were invalid "on the ground that [they] were adopted by the board in violation of the [APA]," *id.* at 364, contradicts Totemoff's implied assertion that *Morry* imposes special hearing requirements beyond those called for by the APA. We do not so read *Morry*.

"[O]ne challenging an administrative regulation 'must show . . . a substantial failure [to comply with the

APA] in order to rebut the presumption of procedural validity.' " *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 394 (Alaska 1990) (alteration in original) (citing *Chevron U.S.A. Inc. v. LeResche*, 663 P.2d 923, 929 (Alaska 1983)). Totemoff has not offered any evidence that 5 AAC 92.080(7), the anti-spotlighting regulation, or 5 AAC 92.001, which applied the anti-spotlighting regulation to subsistence hunting, were invalidly adopted.[10]

However, because the district court ruled that Totemoff's challenge was barred by *Eluska*, the district court was unable to inform Totemoff that he had not presented the kind of evidence necessary for an informed ruling on the validity of the regulation, and to give Totemoff an opportunity to remedy the deficiency in his pre-trial motion challenging the regulation. As a result, it would be unfair to rule on Totemoff's attack on the regulation without giving Totemoff an opportunity to introduce evidence that the procedures mandated by AS 44.62.180-.290 were not followed when 5 AAC 92.001 or 5 AAC 92.080(7) were adopted. *See Union Oil Co. of California v. State, Dep't of Natural Resources*, 574 P.2d 1266, 1272

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[10] As noted, the regulations challenged in *Morry* dealt not with the means of pursuit or capture of game, but with the handling of animal parts considered trophies. The artificial light regulation does not suffer from the substantive defect of the Morry regulations in that it is not a trophy-hunting regulation which is "manifestly unreasonable" in its application to subsistence hunting. *See id.* at 363. Reasonable grounds for applying the spotlighting ban to subsistence hunting include safety concerns associated with shots fired at night, preventing the wrong species from being taken, and making enforcement of bag limits easier.

(Alaska 1978) (challenger to regulations given opportunity to present additional evidence on remand, where challenger had not had sufficient reason to introduce evidence relevant to attack on regulations in original proceedings below because of procedural history of case).

The appropriate remedy is thus a remand to the district court. If Totemoff demonstrates on remand that 5 AAC 92.001 or 5 AAC 92.080(7) were adopted without Board compliance with AS 44.62.180-.290, the district court should vacate Totemoff's conviction and dismiss the charges against him. If Totemoff fails to make the requisite showing, the district court should allow his conviction to stand.

IV. *CONCLUSION*

We hold that the State has jurisdiction over Totemoff because it has the power to enforce its hunting and fishing laws against subsistence users on federal land, so long as those laws do not conflict with federal laws or regulations. There is no such conflict in this case, since there is no federal right to employ customary means and methods of taking. We further hold that the State has jurisdiction over Totemoff because he violated Alaska law in navigable waters above state lands and ANILCA does not give the federal government the power to regulate subsistence hunting and fishing in such navigable waters.

We REVERSE the decision of the court of appeals that *Eluska* bars Totemoff from challenging the spotlighting regulation. Alaska Statute 16.05.259 also does not stop Totemoff from contesting the regulation. We hold that the regulation is invalid under *Morry* only if the Board failed

to comply with the requirements of AS 44.62.180-.290. *Morry* does not impose a substantive hearing requirement on the Board not contained in the APA.

We REMAND this case to the district court for development of the record relevant to Totemoff's procedural challenge to the spotlighting ban. If Totemoff demonstrates that the Board did not comply with the requirements of AS 44.62.180-.290 when it passed 5 AAC 92.001 or 5 AAC 92.080(7), the district court should vacate Totemoff's conviction and dismiss the charges against him. Otherwise, the conviction is to stand.

Mike TOTEMOFF and Henry Milette, Appellants,

v.

STATE of Alaska, Appellee.

Nos. A-4276, A-4308.

Court of Appeals of Alaska.

Dec. 23, 1993.

Anne M. Wilkas and Paul E. Malin, Asst. Public Defenders, and John B. Salemi, Public Defender, Anchorage, for appellant Totemoff.

Randall S. Cavanaugh, Anchorage, for appellant Milette.

Jeffrey T. Killip, Asst. Atty. Gen., Office of the Attorney General, Anchorage, and Charles E. Cole, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., COATS and MANNHEIMER, JJ.

OPINION

BRYNER, Chief Judge.

A jury convicted Mike Totemoff and Henry Milette of unlawfully taking game with the aid of an artificial light (spotlighting), in violation of 5 Alaska Administrative Code (AAC) 92.080(7).[1] Totemoff and Milette appeal, contending that District Court Judge John D. Mason erred

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[1] 5 AAC 92.080(7) provides in part: "The following methods of taking game are prohibited: . . . with the aid of . . . artificial light. . . ."

by denying their pretrial motions to dismiss and by rejecting their proposed jury instructions. We affirm.

On the night of December 27, 1990, Alaska State Trooper James Cockrell and two other officers were patrolling Prince William Sound when they saw a fast-moving boat shining a spotlight on the beaches of several islands. The officers followed the boat for ten or fifteen minutes until it went into a bay at Naked Island. Cockrell watched through binoculars as the spotlight beam settled on a particular area of land for several minutes. Cockrell saw one of the two people in the boat, Milette, make two trips up onto the beach, disappearing into the trees for a few seconds and then returning to the boat at a slower pace. Then the other person in the boat, Totemoff, went onto the beach; Cockrell saw the spotlight on again for about another minute before it turned off.

Concluding that Totemoff and Milette had likely just unlawfully shot two deer with the aid of a spotlight, Cockrell and the other officers maneuvered their boat into the bay to investigate. They discovered Totemoff and Milette with two freshly gutted deer carcasses on the beach. The officers found three other deer carcasses in Totemoff's and Milette's boat, along with two rifles, a Q-beam hand-held spotlight, and other hunting equipment.

After being charged with unlawfully taking deer by spotlighting, Totemoff and Milette moved to dismiss the charges, contending, among other things, that the state had no jurisdiction to prosecute them. Specifically, Totemoff and Milette claimed that the alleged violations occurred on federal land. They asserted that state jurisdiction had been preempted by the federal government's

recent assertion of control over fish and game management on Alaska's federal public lands – a course of action resulting from the state's failure to implement the rural subsistence preference set forth in the Alaska National Interest Lands Conservation Act (ANILCA).[2]

After an evidentiary hearing on Totemoff's and Milette's motions to dismiss, Judge Mason found that the alleged violations had occurred on federal public lands.[3] The judge nevertheless concluded that the state had jurisdiction over the alleged offenses.

On appeal, Totemoff and Milette first argue, as they did below, that the state had no jurisdiction to prosecute state hunting violations occurring on federal public lands. To resolve this argument, we must first consider the scope of the state's traditional authority to prosecute fish and game violations occurring on federal public lands; we must then inquire whether and to what extent this authority has been curtailed by recent federal regulations promulgated under ANILCA.

As a general proposition, states enjoy broad civil and criminal jurisdiction over federal public lands located within their boundaries. *Kleppe v. New Mexico*, 426 U.S. 529, 543-45, 96 S.Ct. 2285, 2293-95, 49 L.Ed.2d 34, *reh'g denied*, 429 U.S. 873, 97 S.Ct. 189, 50 L.Ed.2d 154 (1976). State jurisdiction must yield in two situations, however: first, when federal law expressly provides for exclusive

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[2] 16 U.S.C. §§ 3101-3233.

[3] On appeal, the state challenges this finding. However, our review of the record convinces us that the finding is supported by the evidence and is not clearly erroneous.

federal jurisdiction; second, when an actual conflict arises between federal and state laws or regulations. *Id.*

When Alaska became a state, the federal government did not assert exclusive federal jurisdiction over the bulk of federal public lands in the state. Although section 4 of the Alaska Statehood Act[4] provided that lands in Alaska over which the federal government retained ownership would remain "under the absolute jurisdiction and control of the United States," the United States Supreme Court has interpreted this provision of the Act to mean that federal jurisdiction over its lands would remain "undiminished" rather than "exclusive"; the Court has thus read this provision to allow the exercise of concurrent state jurisdiction over federal public lands in Alaska. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 67-71, 82 S.Ct. 562, 566-69, 7 L.Ed.2d 573 (1962). Since passage of the Statehood Act, federal statutes dealing with public lands in Alaska have commonly included provisions specifying that they neither diminish nor enlarge Alaska's authority over fish and game management on federal lands within the state's borders. *See, e.g., Alaska v. Andrus*, 429 F.Supp. 958, 962 (D.Alaska 1977) (quoting 43 U.S.C. § 1732(b)), *aff'd*, 591 F.2d 537 (9th Cir.1979).

ANILCA itself contains such a provision: "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and game on the public lands except as may be provided in title VIII of this Act, or to amend the

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[4] 72 Stat. 339, as amended.

Alaska constitution." 16 U.S.C. § 3202(a).[5] This provision makes it clear that, unless prohibited by title VIII of ANILCA, the state was authorized to enforce its fish and game laws against Totemoff and Milette, even though their offenses occurred on federal public lands.[6] We must thus inquire whether title VIII of ANILCA deprived the state of the authority it would otherwise have had.

Title VIII of ANILCA (16 U.S.C. § 3111-3126) requires that fish and game on federal public lands in Alaska be managed in a manner giving preference to "the subsistence way of life."[7] To this end, section 804 of the Act (16 U.S.C. § 3114) establishes a rural subsistence preference to be applied in the allocation of fish and game resources. Section 805 (16 U.S.C. 3115) authorizes the Secretary of the Interior to promulgate regulations governing subsistence use of fish and game on Alaska public lands.

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[5] *See also* 16 U.S.C. § 3202(c) ("The taking of fish and wildlife . . . shall be carried out in accordance with the provisions of this Act and other applicable State and Federal law.").

[6] As we pointed out earlier, even in the absence of an express assertion of exclusive federal jurisdiction, the state would be barred from enforcing state laws on federal public lands if those laws actually conflicted with federal laws. However, Totemoff and Milette do not contend that 5 AAC 92.080(7), the state spotlighting regulation at issue here, is actually at odds with any federal law or regulation. In fact the state regulation is almost identical to 36 C.F.R. § 242.25(b)(1)(vii), which expressly prohibits taking game for subsistence purposes with the aid of a spotlight.

[7] *See generally Bobby v. Alaska*, 718 F.Supp. 764, 766-67 (D.Alaska 1989).

The foregoing provisions plainly indicate that the drafters of ANILCA intended to authorize federal management – and potentially exclusive federal management – of fish and game resources on Alaska's federal public lands. Subsection 805(d) of ANILCA nevertheless specifies that the State of Alaska could continue to exercise full authority over fish and game management, provided that the state adopted laws implementing ANILCA's rural subsistence preference.

Because Alaska did initially attempt to conform its fish and game laws to ANILCA's subsistence requirements, the federal government did not immediately promulgate subsistence regulations pertaining to Alaska public lands. Ultimately, however, Alaska's efforts to enact a subsistence preference conforming to the requirements of ANILCA proved unsuccessful: in *McDowell v. State*, 785 P.2d 1 (Alaska 1989), the Alaska Supreme Court declared the preference of rural over non-rural subsistence users a violation of the Alaska Constitution. In 1991, the federal government responded by adopting federal regulations to implement ANILCA's subsistence preference on its public lands in Alaska. *See* 36 C.F.R. § 242.[8]

The precise question we face here is whether and to what extent these federal subsistence regulations precluded the state from continuing to enforce its fish and game laws against Totemoff and Milette for acts occurring on federal public lands. As was made clear in *Kleppe*

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[8] Regulations duplicating these provisions were also promulgated in 50 C.F.R. § 100.

v. New Mexico, 426 U.S. at 543-45, 96 S.Ct. at 2293-95, the state's authority to enforce its laws against Totemoff and Milette could be abridged in two ways: 1) if the federal government's subsistence regulations purported to assert exclusive jurisdiction over fish and game management, or 2) if those regulations actively conflicted with Alaska law.

Neither circumstance occurs in this case. First, the federal subsistence regulations do not purport to assert exclusive jurisdiction over fish and game management on federal public lands in Alaska. At the time of Totemoff's and Milette's offenses, former 36 C.F.R. § 242.14 provided:

> State of Alaska fish and wildlife regulations apply to Federal public lands unless the Board finds it necessary to promulgate regulations which augment or super[s]ede State regulations in order to ensure the priority for subsistence use of fish or wildlife on Federal public lands.

See 56 Fed.Reg. 29310-01 at *21-*22.[9] This regulation expressly provided for continued application of Alaska fish and game regulations on federal public lands; Alaska

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[9] The current version of this regulation goes beyond the original by making Alaska fish and game regulations applicable to public lands, while simultaneously adopting the state regulations, absent actual inconsistency, as federal regulations. In its current form, 36 C.F.R. § 242.14(a) (1992) reads: "State fish and game regulations apply to public lands and such laws are hereby adopted and made a part of these regulations to the extent they are not inconsistent with, or superseded by this Part." As written, this regulation effectively permits concurrent federal/state enforcement efforts on federal public lands, except in situations in which specific federal regulations conflict with or supersede corollary state provisions.

was precluded from acting only if it sought to enforce a state regulation that had been "augmented" or "superseded" by a federal subsistence regulation.

Second, there is no actual inconsistency between the state and federal regulations in question here. Totemoff and Milette have cited no federal regulations or statutes that are inconsistent with the state's enforcement of 5 AAC 92.080(7), and we are aware of none. Indeed, 36 C.F.R. § 242.25(b)(1)(vii), which expressly forbids spotlight hunting as a means of "taking wildlife for subsistence," is functionally identical to 5 AAC 92.080(7), thus making it clear that federal and state regulations are entirely compatible.[10]

Because the federal regulatory scheme does not purport to assert exclusive federal jurisdiction over fish and game management and does not conflict with Alaska's

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[10] Although Totemoff and Milette do not raise the issue, an argument might be made that the federal spotlighting regulation superseded the Alaska regulation because, even though consistent, the two regulations addressed the same subject matter. The federal spotlight regulation, however, applies only to subsistence taking (in contrast to the state regulation, which applies to both subsistence and non-subsistence taking). To read the federal regulation as superseding Alaska's broader spotlighting regulation would require us to conclude that the federal regulation intended to condone spotlight hunting on public lands as a general matter, prohibiting it only for subsistence users. Since this intent would plainly conflict with the regulation's underlying purpose of implementing ANILCA's rural subsistence preference, we conclude that the federal spotlighting regulation cannot reasonably be construed as being intended to supersede Alaska's similar, but somewhat broader, provision.

spotlighting regulation, we conclude that Judge Mason did not err in denying Totemoff's and Milette's motions to dismiss the prosecutions on the grounds of preemption.

Totemoff and Milette alternatively contend that, even if federal law did not preempt state law in this case, the state spotlighting regulation was invalid because the state promulgated it without taking into account the fact that spotlight hunting is a customary and traditional method of subsistence hunting.

At the trial court level, Totemoff and Milette moved to dismiss on this ground. Judge Mason denied their motions without ruling on the validity of the state regulation, reasoning that the regulation's purported invalidity would not constitute a defense to the charges in this case. *See State v. Eluska*, 724 P.2d 514, 515-16 (Alaska 1986), in which the Alaska Supreme Court declared that a defendant charged with violating a hunting regulation had no right to challenge the regulation on grounds that it was adopted in violation of applicable subsistence laws.

On appeal, Totemoff and Milette cite a number of federal cases that, in contrast to *Eluska*, seemingly allow defendants charged with fish and game violations to raise subsistence-based defenses. *See, e.g., United States v. Alexander*, 938 F.2d 942 (9th Cir.1991); *Bobby v. Alaska*, 718 F.Supp. 764, 778-79 (D.Alaska 1989). Totemoff and Milette suggest that these federal decisions should be read to control over *Eluska*. This suggestion is plainly wrong, however, since no federal court other than the United States Supreme Court can control the decisions of state courts, even on questions of federal law. *Matter of F.P.*, 843

P.2d 1214, 1215 n. 1 (Alaska 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2441, 124 L.Ed.2d 659 (1993).

Totemoff and Milette also suggest that, despite *Eluska*, a subsistence-based challenge should have been allowed in their case because their offenses occurred on federal public lands. Totemoff and Milette appear to reason that, since they committed the offenses on federal land and might have been prosecuted under federal law, they should be entitled to raise in state court any defense they would have been entitled to assert had they been prosecuted federally.

Totemoff and Milette cite no authority to support this curious blend of federal and state law, which appears to us to mix jurisdictional apples and procedural oranges. Even assuming their legal theory might have merit in some circumstances, it would plainly be inapplicable in this case, since spotlight hunting is illegal under federal law as well as state law. Because federal law expressly prohibits spotlighting as a means of subsistence taking, Totemoff and Milette would not have been entitled to a subsistence-based defense in federal court had they been prosecuted under federal law.

Finally, Totemoff and Milette contend that Judge Mason erred in rejecting instructions telling the jury that unanimity was required on the issue of which deer Totemoff shot and which deer Milette shot and on the issue of whether Totemoff and Milette acted as principals or accomplices.

We find no merit to this argument. Our cases have held that, when two or more discrete acts, each potentially amounting to a crime, are encompassed in a single

charge, the jury must be unanimous in deciding the act upon which it determines guilt. *See Nunn v. State*, 845 P.2d 435, 443-44 (Alaska App.1993); *Covington v. State*, 703 P.2d 436, 440-41 (Alaska App.1985), *modified*, 711 P.2d 1183, 1184-85 (Alaska App.1985). We have never intimated, however, that a jury must agree whether a defendant acted as a principal or as an accomplice when proof would allow conviction under either theory. Existing case law indicates the contrary. *See Hansen v. State*, 845 P.2d 449, 451-52 (Alaska App.1993); *Knutson v. State*, 736 P.2d 775, 779-80 (Alaska App.1987).

In this case, it was sufficient that the jury find beyond a reasonable doubt that both Totemoff and Milette participated jointly in the endeavor of shooting deer with the aid of a hand-held spotlight. As a matter of law, both men could be held accountable for their own acts or as accomplices. *See* AS 11.16.100. The jury was not required to be unanimous as to the precise theory upon which it returned its guilty verdicts. *State v. James*, 698 P.2d 1161 (Alaska 1985).

We AFFIRM the convictions.

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

Section 102, 16 U.S.C. § 3102. Definitions

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)–

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.

(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except–

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

* * *

(18) The term "take" or "taking" as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

Section 801, 16 U.S.C. § 3111. Congressional declaration of findings

The Congress finds and declares that–

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

Section 802, 16 U.S.C. § 3112. Congressional Statement of Policy

It is hereby declared to be the policy of Congress that–

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this

Act, the purposes of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

Section 803, 16 U.S.C. § 3113. Definitions

As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term–

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "barter" means the exchange of fish and wildlife or their parts, taken for subsistence uses–

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

Section 804, 16 U.S.C. § 3114. Preference for Subsistence Uses

Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the applications of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

Section 805, 16 U.S.C. § 3115. Local and Regional Participation

(a) Establishment of subsistence resources regions, local advisory committees, and regional advisory councils; membership, duties, and authority of regional advisory councils. Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish–

(1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;

(2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and

(3) a regional advisory council in each subsistence resource region.

Each regional advisory council shall be composed of residents of the region and shall have the following authority;

(A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;

(B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(C) the encouragement of local and regional participation pursuant to the provisions of this title in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

(D) the preparation of an annual report to the Secretary which shall contain–

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committee or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) Assignment and staff and distribution of data. The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution

of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) Consideration of reports and recommendations of regional advisory councils. The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth in the factual basis and the reasons for his decisions.

(d) Supersedure by enactment and implementation of State laws governing State responsibility; consideration of recommendations by State rulemaking authority. The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the

public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 [this section] shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

(e) Reimbursement to State; limitation; report to Congress. (1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be

verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

(2) Total payments to the State under this subsection shall not exceed the sum of $5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 804.

§ 3116. Federal monitoring; reports to State and Congressional committees

The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 [16 USCS § 3114] and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as he deems necessary of his views on the effectiveness of the implementation of this title [16 USCS §§ 3111 et seq.] including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

Section 807, 16 U.S.C. § 3117

(a) Exhaustion of administrative remedies; civil action; parties; preliminary injunctive relief; other relief; costs and attorney's fees. Local residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d) may, upon exhaustion of any State of Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. In a civil action filed against the State, the Secretary may be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

(b) Priority (repealed). A civil action filed pursuant to this section shall be assigned for hearing at the earliest possible date, shall take precedence over other matters pending on the docket of the United States district court at that time, and shall be expedited in every way by such court and any appellate court.

(c) Section as sole Federal judicial remedy. This section is the sole Federal judicial remedy created by this title for local residents and other residents who, and organizations which, are aggrieved by a failure of the State to provide for the priority of subsistence uses set forth in section 804.

* * *

§ 3119. Cooperative agreements

The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title [16 USCS §§ 3111 et seq.].

§ 3121. Rural residents engaged in subsistence uses

(a) Access to subsistence resources. The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

(b) Use of snowmobiles, motorboats, or other means of surface transportation. Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes

of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.

§ 3122. Research

The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands; seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary or State pursuant to section 805 [16 USCS § 3115], and other appropriate persons and organizations.

§ 3123. Periodic reports

Within four years after the date of enactment of this Act [enacted Dec. 2, 1980], and within every three-year period thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the President of the Senate and the Speaker of the House of Representatives on the implementation of this title [16 USCS §§ 3111 et seq.]. The report shall include –

(1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806 [16 USCS § 3116];

(2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;

(3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

(4) the role of subsistence uses in the economy and culture of rural Alaska;

(5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 805 [16 USCS § 3115], and other appropriate persons and organizations;

(6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands; and

(7) such other recommendations the Secretary deems appropriate.

§ 3124. Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title [16 USCS §§ 3111 et seq.].

§ 3125. Limitations and savings clauses

Nothing in this title [16 USCS §§ 3111 et seq.] shall be construed as –

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy

populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

* * *

§ 3202. **Taking of fish and wildlife**

(a) **Responsibility and authority of State of Alaska.** Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act [16 USCS §§ 3111 et seq.], or to amend the Alaska constitution.

(b) **Responsibility and authority of Secretary.** Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.

PROCEEDINGS

THE COURT: Please be seated. That's fine. This is the time and place the Court indicated it would rule on motions that actually were taken under advisement and I hoped to rule on a little earlier. The cases are State of Alaska versus Mike Totemoff, originally filed as a Cordova case, now transferred to Whittier.

* * *

The general facts in this case, and I won't be too detailed, are basically the defendants were in an operation in Prince William Sound around Naked Island and some other little islands around there. Both defendants, Totemoff and Milette, on December 27th, 1990, the officers had a tip that there was spot lighting operations going on and they were specifically out looking for spot lighters. They observed some lights and followed them, actually for quite a while, and they detected – they thought there was spot lighting, they saw the lights go up on the beach and stop. They went up and surprised the defendants. There were two deer on the beach, which had in fact been recently taken. One deer still had a temperature of 108 degrees.

They were basically spot lighting and they were surprised by the Fish and Game officers. And there were two deer on the beach, and I think three others in the boat, although I could have the number wrong, some other deer in the boat.

The defendants were clearly hunting off a larger fishing vessel, about a 50-foot vessel that was anchored a mile away or so. And to which the officers returned the

defendants right after the initial contact, or shortly thereafter. There were, I think, some other deer on the bigger fishing vessel.

The two hunters, Totemoff is a resident of Tatitlek, lives there; Milette has moved to Kenai. Apparently he was raised in Tatitlek by parents who were teachers but he moved to Kenai, the time he moved is unclear to the Court. There was another person apparently on one of the fishing vessels from Palmer but there's not very much facts about him and that really doesn't enter into the consideration in this case.

Naked Island is an island in Prince William Sound and there was testimony at the trial as to how far it was from Tatitlek but I can't remember the figure, I think about 50 miles, correct me if I'm wrong.

MR. MALIN: Forty miles, I think. I thought it was 40.

THE COURT: Maybe 40 miles. A substantial distance but not an impossible distance from Tatitlek.

The basic argument in this case that the Court is now addressing is the defendant's argument that the defendant were engaged in legitimate – the basis of the defendant's argument is the defendant was engaged in subsistence hunting, that spot lighting deer is a customary and traditional method used by Tatitlek ever since deer were introduced in Prince William Sound. That they in this case had the proper license and tags and it's only a question of the method of taking.

Under state law – regulation cited, 5 AAC 92.080 parenthesis 7, spot lighting is made unlawful – specifically made unlawful as a method of taking. There's no exception for subsistence under state law.

The basic arguments made by the defendants are that either federal law has preempted the field or Alaska regulation is invalid, either on its face or as applied in this case. Or a third argument being made is that if the Court holds neither one of those the defendant should at least raise a subsistence defense at trial, like they did in U.S. v. Alexander, decided by the ninth circuit in July of 1991.

As to the specific showing, factual showing by the defense, I'm not going to be too detailed but it is clear that – I mean it's been shown clearly to me that deer are a subsistence food item of the Tatitlek people, or have been for quite a while. It was either in second or third place after salmon and maybe one other item, I think in second place. But it's clearly a major subsistence food item of the Tatitlek people. I don't think that's very arguable under the materials filed by the defense.

As to whether these defendants – particular people – were subsistence hunting on the night in question, that's a little harder. But there's no evidence they were not hunting other than for food. They're hunting in late December, it is late at night, it doesn't look like a sport hunting operation in the sense of going out and camping, they're patrolling the beaches, shooting deer from their motor boats off the beaches; spot lighting them and shooting them.

And I would think that – there's no evidence they were doing it other than for a food source. So I will conclude for the purposes of this motion that they were in fact hunting for food.

As to whether that method is customary and traditional that's a closer question. There were people – two witnesses from North Pacific Rim – I don't know if I'm going to pronounce her name right, Taska (sic) Shimonowski (sic) (Tasha Chmielewski), and the executive director, Mr. Rolland. Both testified it was their opinion that spot lighting was customary and traditional. But that's really based on talking to a limited number of people from Tatitlek, three to five people.

The evidence that's coming in is the testimony of the defendant and hearsay statements from – or statements through the people from North Pacific Rim, who based their opinion on – spot lighting is customary and traditional.

In view of the ruling I'm going to make I'm not going to rule specifically whether that's been shown by clear and convincing or a preponderance of the evidence.

I have some reservations about the large kind of hunting operation going on in this case. And basically this is a mechanized operation off a big fishing boat 50 miles from Tatitlek where the people are going out on motor boats and spot lighting deer at night from the beaches. This is not a small one-type operation close to Tatitlek, it's 40 miles away off a big fishing boat. I have some question whether that has a bearing on the customary and traditional part of this.

But on the other hand the defendant has shown pretty good evidence that – or some evidence that the people in Tatitlek have traditionally hunted by spot light, whether it's lawful or unlawful. I think that's a pretty close question.

The question is whether that's a legitimate thing for the Court to decide or for a jury to decide.

I'll go specifically to the arguments raised by the defense. There is one comment though that I would like to make first, that is under both state law and federal law, the new federal regulations adopted – and specifically in the federal regulations there's a board, they set up regional advisory councils, and they set up local advisory committees. The idea being that there's input from the local communities as to what is subsistence. The board is specifically empowered and directed to address these concerns and to make – the federal board – and to make specific regulations to allow for legitimate subsistence use.

And so there is a way for people to – or there's supposed to be a system being set up under the federal law, and I think that also applies under the existing state regulations before the federal people took over on federal land – to set up committees so that people with – legitimate subsistence concerns can be addressed.

The defense has argued and cited the Alexander case about the people in a pickup being very difficult to have access through the boards – the local advisory committees, the regional advisory councils, and the board – to actually have their subsistence questions addressed.

I think that it's a highly preferable system to go through the board and committees rather than take it on yourself to decide what law is or is not applicable to subsistence and then try to argue it in a criminal case later on.

I don't think it's a very good thing if people can in their own right decide what law is or is not relevant to subsistence. And even though it's difficult – and I find it would be difficult for the people in Tatitlek to actually get these addressed – still I think they have a high duty to do so.

I'll go specifically to the ruling I'm going to make in this case, which addresses federal preemption and whether the regulation's invalid.

As to federal preemption – oh, one other thing I want to rule on before I do that, and that is – go off the record, I'm going to have to get my notes straightened out.

(Pause on record)

I missed one point that I wanted to address earlier. Go back on the record.

The one thing I wanted to clear up before I actually addressed the federal preemption question and the regulation validity, there's been some suggestion in this case that state law should apply because the deer were really on the tide lands and the tide lands aren't part of Naked Island, they're part of state land, or at least the state has concurrent jurisdiction over the tide land. And that therefore state law should apply independent of the fact the deer were taken on federal land. I reject that. I think these are Naked Island deer, they're nurtured on Naked Island, they grow up there, they live on the island, they might

wander out to the beach once in a while but they're a land animal that lives on the island.

Specifically speaking in this case, it would appear that the one deer that we know about was shot probably in the brush land behind the tide land, but that isn't really the basis of the ruling, the basis of the ruling is that the deer aren't a tide land animal, they're an island animal, and they grow up on Naked Island and they're shot on Naked Island, even if it's maybe on the beach. It's really unclear where all these deer were shot, they're spot lighting them on the beach. But I think the deer come from Naked Island, they're federal deer, at least deer that grow up on Naked Island as opposed to the beaches, and I'm going to conclude that they were taken on Naked Island, independent of whether they were shot on the beach or back behind the tide line.

The question as to federal preemption, the defendant basically argues that the state court doesn't have jurisdiction because the federal people took over after the McDowell decision, and McDowell v State, 785 P2d 1, Alaska 1989. After that decision Alaska's not in compliance with ANILCA and therefore the feds have had regulations – which they did effective 7/1/90 – and therefore have preempted the field, or at least the state court doesn't have jurisdiction any longer.

I pretty carefully reviewed the regulations, they're contained in 36 CFR Part 242 for the Forest Service, and a corresponding part in 50 CFR. The regulations make several points clear. The first thing I want to address is – reads – and this is Section 242.5, "It is the policy of the department to minimize conflict between resource uses

on public and non-public lands. The board will consider the recommendations of state regional council, local advisory committees, public input, and comment."

In other words it's the policy of the federal regulations to not – to be the least amount inconsistent with the state regulations to accomplish the subsistence purpose.

Then it establishes a board and the duties of the board. The duties of – the board – this is the federal board – is empowered to promulgate regulations for the management of subsistence taking, apply a subsistence priority as is necessary – I'm not reading all the duties, just some of them – make rural and non-rural determinations, determine which rural communities – which rural Alaska areas or communities have customary and traditional subsistence uses, review and respond to proposals by regional advisory councils, et cetera.

Then they're required to establish at least geographic subsistence divisions, et cetera. The board shall consider the reports and recommendations of councils, et cetera.

Then it goes into the regional advisory councils and local advisory committees.

Section 242.14, and I think this is critical, it reads: "State of Alaska fish and wildlife regulations, other than subsistence regulations, apply to public lands unless the board finds it necessary to promulgate regulations which supersede state regulations in order to insure the opportunity for subsistence take of fish or wildlife."

So the federal regulations specifically say the state regulations apply other than subsistence regulations.

The problem I was initially having in this case was it seemed to me that state regulations apply unless there's a subsistence question, and how do you figure out if there's a subsistence question. And that caused me great difficulty. Was it for the Court to figure out as a matter of law, was it for the jury to figure out if you submitted the case to the jury? That caused a lot of conflict.

My conclusion is, under federal preemption – we'll go right to the sections – oh, one other section, 242 indicates that state licenses and permits and harvest tickets – persons engaged in subsistence activities relating to taking of fish or wildlife must possess State of Alaska licenses, permits, et cetera.

Now we go to the specific section, section (D), subsistence hunting and fishing. Actually it's subsistence hunting and trapping. Under section (B)(1), the following methods of taking game are prohibited. And it goes through all eight or nine – actually nine methods. Shooting across the highway, poison, helicopters, from mechanical vehicles or motor driven boats, use of aircraft or snowmachine or motorized vessel for the purpose of hurting or driving game, with the use of a machine gun, et cetera, or a shotgun larger than 10 gauge.

And then a specific regulation under state law which was adopted by the federal people. With the aid of a pet, artificial light – and that's the specific thing we're dealing with, artificial light – and then it goes on with some other things, smoke bomb, chemical, some types of traps. And then it reads (2), (B)(2), the following methods and means of taking big game for subsistence are prohibited in addition to the prohibition in paragraph (B)(1). Then it lists a

number of things specifically related to subsistence. And there are some exceptions.

One reads with the use of a firearm other than a shotgun, et cetera, except in unit 23, swimming caribou may be taken with a firearm using a rimfire cartridge. And then other sections, with the use of a muzzle-loading rifle, unless such firearm is .54 caliber or larger. With a long bow unless the bow is capable of doing such and such. With the use of bait except that black bears may be taken, et cetera.

The point I want to make is the federal regulation specifically adopted section (B)(2), which indicates that the methods outlined in (B)(1) are prohibited for subsistence operation.

In other words the federal regulation prohibits spot lighting for subsistence. And this is something adopted by the federal people. It may come from state law but it's something the federal people have adopted.

If the federal people have adopted the regulations that make it unlawful to spot light even for subsistence, it seems to me that it's very difficult to claim that subsistence is legitimate under federal law. If it's not legitimate subsistence under federal law, then by the section that we read earlier it's thrown back to the state. Because things that are not subsistence are, under section 242.14, controlled by state law.

The State of Alaska fish and wildlife regulations other than subsistence regulations apply to public land.

I decline to hold that the state regulations are not valid on federal lands, in this case Naked Island, because

the federal regulations themselves specifically indicate that spot lighting is not a legitimate method for subsistence taking.

I might have a more difficult time on the federal preemption question. Actually it's a lack of – the defense is arguing lack of state jurisdiction. If it hadn't of been for section 242.14 in the federal regulations and section 242 – 240 – Im [sic] sorry, 242.23(B)(1) and specifically (B)(2).

I hold that the state court has jurisdiction in this case under those regulations.

The next question is whether or not the regulations are invalid. The defense – their memorandums are in the file. But the basic argument of the defense is that the state did not do its job because they did not adequately address subsistence use.

The defense has argued that the regulations conflict with general state law under the Administrative Procedures Act and Title 44. I'm going to get right down to the real argument made in this case. I don't think the showing in this case is sufficient, or the arguments are sufficient that I am going to conclude that all the regulations adopted by the state are generally in conflict with Title 44. I'm only going to address the arguments in relation to this case, not that state regulations are invalid generally.

The real argument is that because the state did not adequately address subsistence needs that the regulations are invalid.

I hold under State versus Aluska that the supreme court has ruled that there's no personal right under the

subsistence regulation. I want to give the specific case. Here it is. The Aluska case reads, on page 515, the citation is 724 P2d 514, page 515. We find no evidence of an intent to grant any person a right to take and possess game in the absence of such regulations. I would read that to expand – to include in violation of the regulation.

The argument made in Aluska and held by the court of appeals is that because the state did not comply with section 255 of Alaska Statute 16.05.255(B) that people could hunt for subsistence without being regulated. By a three to two split in the state supreme court the majority rejected that argument. But the opinion in dissent reads – I think it's written by Thompson – reads – Justice Thompson – I conclude that since the board has failed to adopt specific subsistence regulations, AS 15.05.255(B) permits unregulated subsistence hunting. The majority rejected that argument. We find not evidence, however, of an attempt to grant any personal right to take or possess game in the absence of such regulation. It is difficult to believe that the Legislature intended unregulated hunting to be the result.

Footnote 5, our dissenting colleagues state that unregulated subsistence hunting is permissible under section 920(A) of the Alaska Statute by virtue of the provisions in section 255(B).

Opinion on page 10, in our view this conclusion is broad since 255(B) speaks exclusively of regulated subsistence hunting.

Footnote 6 on page 516, the court of appeals' construction of AS 16.05.255(B) practically removes large portions of state resources from any management plan, it

shifts decision making from the state to individual hunters. We believe that the Legislature did not intend such a constitutionally suspect elimination of management.

If I hold with the defense in this case it basically says anybody can claim subsistence, use any method they think they can arguably support knowing it's in violation of existing regulations and argue subsistence later.

I hold that the Aluska case precludes that argument from being raised.

I am aware of the federal cases which allow subsistence to be raised as a defense, specially Alexander. I hold that I'm bound by the state supreme court in a case under state law in a state court which basically rejects the subsistence defense argument and basically says that unless it's permitted by the regulation – and I would include that to include if it's specifically prohibited by regulation – that you can't hunt and then claim subsistence later.

I think I'm bound by the Aluska case and not the cases decided by the federal court. So I hold the defendant cannot raise the subsistence defense in this case, either to the Court invalidating the regulation or at trial.

Now I know that's a ruling that's against the defense and the defense made a substantial showing in this case. I think that it's the correct legal ruling under the Aluska case. Once I conclude that state law applies on Naked Island. Now that's the ruling.

* * *

IN THE SUPREME COURT OF THE STATE OF ALASKA

MICHAEL TOTEMOFF, Petitioner, v. STATE OF ALASKA, Respondent.	Supreme Court No. S-6151 ORDER (Filed Apr. 18, 1994)

Court of Appeals No. A-4276
Superior Court No. 3WH-91-25 Cr.

Before: Moore, Chief Justice, Rabinowitz, Matthews and Compton, Justices.

On consideration of the petition for hearing, filed on February 11, 1994, and the response to the petition, filed on March 25, 1994,

IT IS ORDERED:

1. The petition for hearing is GRANTED as to both points relied upon for reversal

2. In connection with the first point relied upon for reversal the parties are directed to address the following questions:

A. Is a prosecution under 5 AAC 92.080(7) for spotlighting deer on federal land for subsistence purposes subject to a defense that spotlighting is a "customary and traditional" method of taking deer which is protected under ANILCA? *See United States v. Alexander*, 938 F.2d 942, 948-49 (9th Cir. 1991); *State v. Morry*, 836 P.2d 358, 268-70 (Alaska 1992).

B. If the answer to the above question is in the affirmative, is there a sufficient nonfederal land nexus in this case to sustain the conviction solely under Alaska law? *See John v. United States*, Docket No. A90-0484-CV, United States District Court for the District of Alaska, March 30, 1994.

C. With respect to question B above, is the State precluded by the decision in *John v. United States* from contending that tidelands or lands under navigable water within the three-mile limit are not subject to ANILCA? *See* Restatement (Second) of Judgments § 29.

3. Under Appellate Rule 305(a), formal briefs conforming to Appellate Rule 212 shall be filed in the Supreme Court. The petitioner's opening brief shall be served and filed on or before *May 20, 1994*. Briefing shall thereafter proceed on the schedule prescribed in Appellate Rule 212(a)(1).

4. Either party may request oral argument within the time allowed by Appellate Rule 213(a).

Entered by direction of the Court at Anchorage, Alaska, on April 18, 1994.

/s/ Jan Hansen
JAN HANSEN
Clerk of the Supreme Court

From: APPELLATE COURTS CLERK
303 K STREET
ANCHORAGE, AK 99501

Case Title: MILETTE/TOTEMOFF V STATE
Supreme Court Case #: 58131

*****ORDER***** 05/24/95

IT IS ORDERED: Totemoff's motion to strike cover letter, filed on 26 Apr 1995, is GRANTED. But, the state may file a short supplemental brief (memo form – original & 5 copies) concerning the 9th Cir.'s KATIE JOHN opinion by 4:30 p.m. on Friday, 26 May. Appellant may then have until 4:30 p.m. on Wednesday, 31 May to file a short responsive supplemental brief. Entered by direction of Justice Matthews.

Clerk of The Appellate Courts

To: PAUL MALIN
PUBLIC DEFENDER'S OFFICE
900 WEST 5TH AVENUE,
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(2)

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

No. 95-1512

In The

Supreme Court of the United States

October Term, 1995

MICHAEL TOTEMOFF,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Alaska Supreme Court

BRIEF FOR THE STATE OF ALASKA IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Alaska Supreme Court decision below conflicts with Ninth Circuit decisions in holding that in passing title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3111 - 3126, Congress did not intend to preclude state enforcement of nonconflicting state law governing hunting on public lands, when the Ninth Circuit has never addressed the issue.

Whether the Alaska Supreme Court decision below conflicts with Ninth Circuit decisions as to the defenses available to a rural resident under title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3111 - 3126, when title VIII does not protect the type of activity the defendant wished to raise as a defense in this case and thus the defense would not have been permitted in federal court.

Whether the Alaska Supreme Court was correct in determining that the term "public lands" in the Alaska National Interest Lands Conservation Act does not include navigable waters in which the federal government possesses reserved water rights, so that the traditional state management of important fisheries in such waters is not preempted by federal officials, a determination contradicted by a decision of the Court of Appeals for the Ninth Circuit.

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STATEMENT OF THE CASE

This case stems from activity the trial judge described as "a mechanized operation off a big fishing boat . . . where the people are going out on motor boats and spotlighting deer at night from the beaches." Pet. App. 74. Mr. Totemoff was convicted of violating a state regulation that prohibits hunting with the aid of lights, an activity prohibited in Alaska since 1938. A nearly identical federal regulation also prohibits spotlighting.

On December 27, 1990, three Alaska Fish and Wildlife Protection officers patrolled Prince William Sound by boat in response to complaints of spotlighting activity. Just before 10 p.m., the officers saw a small skiff along Story Island scanning the shore with a spotlight. The officers followed and watched it skirt several islands while spotlighting the beaches. They saw the skiff concentrate its light on a beach on Naked Island. A man stood on the bow of the skiff, ran up the beach into the brush and disappeared for a few seconds, then returned more slowly to the skiff. The officers also saw a second man. They approached the men and found them standing over two freshly-gutted deer carcasses. One of the men was Mike Totemoff, a rural Alaskan resident, who admitted shooting one of the deer. The skiff contained three more deer carcasses. The men had brought the skiff from a fishing vessel anchored nearby, which also contained three deer carcasses.

Although the deer hunting season had opened August 1, Mr. Totemoff was hunting in December. Spotlighting is most effective in winter, when hungry deer come down to the beach to eat kelp, and in the dark,

when a spotlight most effectively "freezes" the animal. The bag limit for the season was five deer. 5 AAC 82.030 (1990).

Mr. Totemoff pleaded not guilty to using unlawful methods of taking game by spotlight, in violation of 5 AAC 92.080(7) (1990). He moved to dismiss, asserting lack of state jurisdiction and invalidity of the regulation under which he was charged. The court denied the motion to dismiss, and a jury found him guilty. He appealed to the Alaska Court of Appeals, which upheld his conviction. *Totemoff v. State*, 866 P.2d 125 (Alaska App. 1993). The Alaska Supreme Court granted his petition for hearing and issued a decision on August 7, 1995 and a corrected decision on October 20, 1995. *Totemoff v. State*, 905 P.2d 954 (Alaska 1995).

REASONS FOR DENYING THE WRIT

Contrary to Mr. Totemoff's assertions, the Alaska Supreme Court decision in this case does not conflict with Ninth Circuit decisions on the issue of whether ANILCA preempts state enforcement of state laws. The decision also does not create a conflict as to the defenses available in an enforcement action against a rural resident. Mr. Totemoff is correct, however, that the decision below conflicts with a Ninth Circuit decision as to whether the state or the Secretaries of Agriculture and Interior have authority to regulate subsistence activities on navigable waters. *State v. Babbitt*, 72 F.3d 698 (9th Cir. 1995). The state has requested that the Court consider the issue in its petition for certiorari in *Babbitt*, No. 95-1084. If the Court

has denied that petition, it should grant Mr. Totemoff's petition on this issue only.

I. THE NINTH CIRCUIT AND THE ALASKA SUPREME COURT HAVE NOT ISSUED CONFLICTING DECISIONS ON ANILCA'S PREEMPTIVE EFFECT, AND ANILCA DOES NOT PRECLUDE A STATE ROLE IN SUBSISTENCE HUNTING AND FISHING IN ALASKA.

Mr. Totemoff argues that in passing ANILCA, Congress intended a scheme of federal regulation so pervasive as to foreclose the enforcement of state laws on the same subject, and asserts that the Ninth Circuit and the Alaska Supreme Court have directly conflicting decisions on ANILCA's preemptive effect. Pet. 13. Neither ANILCA nor its legislative history indicate that Congress intended title VIII to effect "field" preemption, and the implementing agencies have not interpreted it this way. The Ninth Circuit also has never found title VIII to have this effect.

Mr. Totemoff argues that federal implementation of the subsistence priority precludes state enforcement of its fish and game laws against a rural resident on public lands. Pet. 13. Further, according to Mr. Totemoff, this preemption occurs even when state law clearly applies to the land where the prohibited activity occurred and federal law prohibited the activity as well. While the state agrees that its constitution prohibits it from passing laws granting a priority for hunting and fishing based on residence, *see McDowell v. State*, 785 P.2d 1 (Alaska 1989), ANILCA still accords state law a role on public lands and permits state enforcement of nonconflicting state law.

Mr. Totemoff's argument is based on an incorrect assumption about title VIII – that title VIII mandates a state enforcement program or the federal agencies will adopt one. Title VIII does not mandate any particular implementation program, however. It simply grants a right, requires local input in considering subsistence needs, and leaves the problem of *how* to implement the right to the managing authority, either the state or the federal agencies.

Title VIII grants a priority to rural Alaskan residents for hunting and fishing for subsistence uses on public lands. 16 U.S.C. § 3114. It does not address how the priority should be implemented or enforced. The element of "cooperative federalism" in title VIII that Mr. Totemoff highlights is not actually written in the statute, but courts have interpreted the statute to require the state to pass a law applying the priority to all lands within Alaska or the federal agencies will promulgate regulations to assure the priority, *see, e.g., Native Village of Quinhagak v. United States*, 35 F.3d 388, 390 (9th Cir. 1994).[1] These regulations set seasons, bag limits, and permitted means and methods for customary and traditional uses of fish and game. The state also has regulations governing hunting and fishing seasons, bag limits, and means and methods for state subsistence and sport hunting and fishing, and commercial fishing. Nothing in ANILCA limits the state's

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[1] Title VIII actually provides only that if the state does not provide statewide laws to implement the priority, the Secretary will establish six regional advisory councils, intended generally to give local residents an opportunity to participate in the process of regulating subsistence uses. 16 U.S.C. § 3115.

authority to enforce state laws that do not encroach upon a rural resident's subsistence priority.

The agencies charged with implementing title VIII have not interpreted it as precluding state participation. To the contrary, the agencies' regulations clearly anticipate a state regulation and enforcement role on federal public lands. For example, when the federal agencies proposed regulations to implement the priority, they explained that the regulations would permit the state to continue to participate in the management of subsistence hunting on public land:

> [T]hese regulations anticipate an interactive process between the State fish and game regulatory procedure. The State, because of its constitution, cannot provide a preference for rural residents with customary and traditional use of fish and wildlife as required by ANILCA. The State can facilitate harvest by rural residents through various regulations dealing with means and methods of take and perhaps other mechanisms. If State regulations allow rural residents the opportunity to obtain their customary and traditional take and uses of fish and wildlife resources, the Federal regulations may closely parallel State regulations. The Federal program anticipates a highly cooperative, interactive relationship with the State system. To the extent that cooperation exists, the Federal program will be able to minimize change to traditional State regulation and management of fish and wildlife.

55 Fed. Reg. 27,114, 27,119 (1990).

Further, the regulations provide that the "State of Alaska fish and wildlife regulations apply to Federal

public lands and such laws are hereby adopted and made a part of these regulations to the extent they are not inconsistent with, or superseded by this part." 36 C.F.R. § 242.14(a) (1995).[2] They provide also that to engage in subsistence hunting on federal public lands, individuals must possess any licenses, permits, harvest tickets, or tags required by the state, unless the Federal Subsistence Board expressly requires federal licensing.[3] 36 C.F.R. § 242.6(a) (1995). The regulations require that any individual not specifically prohibited by federal regulations from hunting or trapping on public lands in a given area follow the appropriate state regulations. 36 C.F.R. § 242.25(j) (1995). The agencies also clearly intended the state to have an enforcement role; the regulations provide that both state and federal enforcement officers may request proof of licensing or other pertinent documents, and that subsistence hunters must allow state or federal law enforcement agents to inspect any apparatus capable of use for hunting or fishing, and any fish or game taken. 36 C.F.R. § 242.6(e) (1995). Thus, the agencies understand that Congress did not intend a scheme of regulation so comprehensive as to exclude all state regulation.

None of the cases Mr. Totemoff cites in support of his "field preemption" argument conflict with the Alaska

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[2] The federal subsistence regulations are duplicated in titles 36 and 50 of the Code of Federal Regulations because they apply to lands administered by both the Department of Agriculture and the Department of Interior. For simplicity, this brief cites only the regulations cited in title 36.

[3] The Secretaries of Agriculture and Interior created the Federal Subsistence Board and delegated it authority to execute their responsibilities under title VIII. 36 C.F.R. § 242.10 (1995).

Supreme Court's decision on this point. The cases hold only that the federal agencies will promulgate regulations to assure that subsistence hunting and fishing take priority over other uses if the state does not pass a law applying the priority to all lands within Alaska. *See, e.g., Native Village of Quinhagak v. United States,* 35 F.3d at 390 ("Alaska's noncompliance with ANILCA made the federal government responsible . . . for implementing ANILCA as to 'public lands.'"). The Alaska Supreme Court acknowledged this and found state law preempted to the extent it conflicts with the federal regulations. Pet. App. 3. The state spotlighting ban itself does not conflict with the federal regulations, as they contain the same prohibition. *See* 36 C.F.R. § 242.25(b)(1)(viii) (1995).

II. THE DECISION BELOW CREATES NO CONFLICT BETWEEN FEDERAL AND STATE COURTS AS TO THE DEFENSES AVAILABLE TO A RURAL SUBSISTENCE HUNTER, AND MR. TOTEMOFF HAD THE SAME RIGHTS IN STATE COURT THAT HE WOULD HAVE RECEIVED IN FEDERAL COURT.

Mr. Totemoff portrays the Alaska Supreme Court decision as conflicting with federal law as to the availability of defenses to a rural Alaskan resident charged with hunting violations. The *Totemoff* decision does not conflict with federal law on this issue. The defense that Mr. Totemoff wanted to present at his trial would have been prohibited in federal court as well.

Mr. Totemoff claims that he was denied an opportunity to present a defense in this case that would have been available in federal court, that spotlighting is a "customary and traditional" subsistence hunting practice.

The Alaska Supreme Court held that ANILCA does not protect "customary and traditional" hunting methods, however. ANILCA precisely defines the activities subject to title VIII's priority in 16 U.S.C. § 3113, and this definition does not include hunting methods. Further, none of the federal cases Mr. Totemoff cites supports his assertion or even addressed the issue.

ANILCA provides that hunting and fishing for subsistence uses by rural residents is accorded priority over hunting and fishing for other purposes. 16 U.S.C. § 3114 (1985). "Subsistence uses" is defined in terms of the uses of the fish and wildlife taken, not in terms of the methods used to take it. *See* 16 U.S.C. § 3113.[4] Spotlighting deer does not constitute a *use* of game subject to the priority; it is a method of taking game. Because ANILCA's priority does not extend to methods, Mr. Totemoff had no right to submit to a jury the factual issue of whether the hunters in Mr. Totemoff's village customarily spotlighted deer.

Given that the statute on its face does not provide any right to use particular hunting methods, the Alaska Supreme Court did not need to consider the legislative history of title VIII. Nevertheless, the legislative history Mr. Totemoff cites does not support his interpretation. He

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[4] 16 U.S.C. § 3113 provides in part:

Definitions: As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption; as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption, for barter, or sharing for personal or family consumption; and for customary trade.

cites a House Committee Report explaining that the bill reported did not limit the priority to hunting and fishing by traditional methods. Pet. 24. This assures that the technology of subsistence hunting and fishing can progress as more effective methods develop. The observation that title VIII does not prohibit improved hunting methods does not support the conclusion that title VIII protects any method that a rural resident can establish to be "customary and traditional," however. In this case, Mr. Totemoff wanted to present evidence that several people in his village had spotlighted deer over a period of 20 years, during which spotlighting was illegal.

The federal cases Mr. Totemoff cites do not address the issue of whether ANILCA protects customary hunting and fishing methods and thus do not conflict with the Alaska Supreme Court's interpretation. In *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995), the Ninth Circuit held that a Forest Service plan that predated ANILCA could not rely on its analysis of reasonable alternatives to timber harvest, as required by the National Environmental Policy Act, to meet the requirement of 16 U.S.C. § 3120 that it consider alternatives with less impact on lands used for subsistence purposes. *Id.* at 731. In *Bobby v. Alaska*, 718 F.Supp. 764 (D. Alaska 1989), the court found that in protecting "subsistence uses," ANILCA required the Alaska Board of Game to accommodate a village's tradition of sharing the moose and caribou its residents take. *Id.* at 780-81. Sharing game clearly constitutes a *use* of the game, and thus falls within the definition of 16 U.S.C. § 3113, but the case did not raise or address the issue of whether this section includes methods of taking game.

The other point that Mr. Totemoff asserts as indicative of a conflict between the defenses available in state and federal court was resolved in his favor by the Alaska Supreme Court in this case. The Alaska Supreme Court agreed with *Bobby*'s holding that a defendant has the right to challenge the statute or regulation under which he is charged. Pet. App. 36. Under Alaska law, the claim that a hunter took fish or game for subsistence uses is not a legitimate defense to a criminal charge that an individual was hunting or fishing when no law authorized it. *See State v. Eluska*, 724 P.2d 514 (Alaska 1986); AS 16.05.259. The Alaska Supreme Court clarified the scope of this rule in its decision in this case. It held that AS 16.05.259 and *Eluska* both prevent an individual from justifying hunting or fishing when not permitted by law by claiming subsistence use, but neither prevent a defendant from challenging the law under which he or she was charged. Pet. App. 36. Thus, a rural resident charged in state court with violating a state law could defend by claiming that the law was invalid as applied to him because ANILCA preempts it. The Alaska Supreme Court found in this case that ANILCA does not preempt the state spotlighting ban, Pet. App. 12, so Mr. Totemoff's challenge to the application of the regulation to himself was unsuccessful.

III. THE COURT SHOULD CONSIDER THE ISSUE OF WHETHER "PUBLIC LANDS" IN ANILCA INCLUDE NAVIGABLE WATERS SUBJECT TO A FEDERAL RESERVED WATER RIGHT BY GRANTING THE STATE'S PETITION FOR CERTIORARI IN *STATE V. BABBITT*, NO. 95-1084.

The state agrees that the Alaska Supreme Court's decision below conflicts with *State v. Babbitt*, 72 F.3d 698,

and that this will create serious jurisdictional conflicts that will harm Alaskans. The state petitioned for certiorari on this issue in the *Babbitt* case. No. 95-1084. If the Court has denied that petition, it should grant Mr. Totemoff's petition on this issue alone.

CONCLUSION

The petition for a writ of certiorari should be denied, except as to the definition of "public lands."

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No. 95-1512

In The

Supreme Court of the United States

October Term, 1995

MICHAEL TOTEMOFF,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition for a Writ of Certiorari To The Alaska Supreme Court

PETITIONER'S REPLY MEMORANDUM

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I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT AND THE ALASKA SUPREME COURT HAVE DIRECTLY CONFLICTING DECISIONS ON ANILCA'S PREEMPTIVE SCOPE THAT CAN ONLY BE RESOLVED BY THIS COURT

A. Introduction and Overview

For the thousands of Alaskans who live in remote rural villages and other rural areas, ANILCA provides a rural subsistence priority that protects their customary hunting practices and subsistence uses on federal land and waters. The Alaska Supreme Court has struck down the rural subsistence priority, rejected protection for customary hunting practices, and repudiated federal jurisdiction over both federal land and waters. The breakdown of the program of "cooperative federalism" established by Congress in Title VIII of ANILCA could not be more complete. The State's assertion that there is no conflict between state and federal law is, therefore, nothing short of incredible.

B. The State Ignores ANILCA's Plain Language

In arguing that there is no conflict between the Alaska Supreme Court and federal courts over ANILCA's

preemptive scope, the State contends that Mr. Totemoff has incorrectly assumed that "title VIII mandates a state enforcement program or the federal agencies will adopt one." Opp. 4. But the plain language of title VIII offers Alaska the choice between "federal regulation or self-regulation with federal oversight." Kenaitze Indian Tribe v. Alaska, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989). The State does not even mention Kenaitze.

The State asserts that "[n]othing in ANILCA limits the state's authority to enforce state laws that do not encroach upon a rural resident's subsistence priority." Opp. 4-5. The State concedes that "the federal agencies will promulgate regulations to assure the [rural subsistence] priority" and that "means and methods" regulations are necessary to assuring that priority. Opp. 4. The State's argument fails on its own terms: if federal means regulations are necessary to implement the priority, state enforcement of its regulations necessarily "encroaches" upon that priority.

That argument aside, under the State's theory of jurisdiction, the State of Alaska and the United States will each separately enforce their essentially identical regulations.

The State of Alaska would retain, under this theory, the same jurisdiction it had when the Alaska legislature had enacted "superseding" state law that met ANILCA's requirements for supplanting the federal regulatory scheme. ANILCA § 805(a),(d), 16 U.S.C. 3115(a),(d) (Pet. App. 63).

Two results are possible under the State's theory of jurisdiction. First, the Secretaries of Agriculture and Interior would have no regulatory program to manage because the State of Alaska would enforce all non-conflicting state laws. Alternatively, the respective sovereigns would simultaneously implement and enforce the same regulatory program. Both results are foreclosed by ANILCA's plain language, federal caselaw, the federal government's express withdrawal of Alaska's certification to manage subsistence uses in 1990, and common sense. Given the State of Alaska's failure to provide a "superseding" rural resident subsistence priority, its "responsibility and authority" is expressly "diminished" to the extent that it has no direct enforcement role. 16 U.S.C. § 3202(a)(b); Section 805(a), 16 U.S.C. § 3115(a)(d) (Pet. App. 61-61,70). See State of Alaska v. Babbitt, 72 F.3d 698, 700-01 (9th Cir. 1995), cert. denied, __U.S.__ (1996) (describing how, in 1990, Alaska's failure to provide ANILCA's rural

subsistence priority resulted in "the federal government withdraw[ing] Alaska's certification [to manage subsistence hunting and fishing on public lands] and [taking] over implementation of Title VIII" by publishing temporary and final subsistence management regulations).

Without citing the statute, or any authority whatsoever, the State asserts that "Title VIII does not mandate any particular implementation program." Opp. 4. That argument completely ignores the plain language of section 805(a), which mandates that "the Secretary ... shall establish ... subsistence resource regions...[,] a regional advisory council in each subsistence region...[, and] such local advisory committees as he finds necessary." 16 U.S.C. § 3115(a)(1)-(3) (Pet. App. 61) (emphasis added). Under section 814, "the Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title [VIII]". 16 U.S.C. § 3124 (Pet. App. 69) (emphasis added). Under section 805, each advisory council is charged with reviewing and evaluating proposed "regulations, policies, and management plans." 16 U.S.C. § 3115(a)(3)(A) (Pet. App. 61). However, "[t]he Secretary shall not implement" this federal subsistence program "if ...

the State enacts and implements laws of general applicability which are consistent with, and which provide for, the definition, preference, and participation specified in sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility..." 16 U.S.C. § 3115(d) (Pet. App. 63) (emphasis added). Title VIII, therefore, unequivocably mandates a particular implementation program whereby direct management by the Secretaries could be withheld upon provision of conforming state laws. Indeed, subsection (d) is entitled "Supersedure by enactment and implementation of State laws governing State responsibility." Id. (emphasis added). This is ANILCA's "clear statement."

The State's argument is premised entirely on federal regulations that permit state officers to investigate violations of federal subsistence regulations. Opp. 6. This limited role, however, does not transform exclusive federal jurisdiction into fully concurrent state jurisdiction. While a state officer who is cooperating with the federal regulatory program may ask a federal rural subsistence hunter for proof of license or inspect gear, jurisdiction for any violation properly lies in federal court.

The State's reliance on administrative interpretations is similarly misplaced. Administrative interpretation of a statute contrary to its plain language deserves no deference. Demarest v. Manspeaker, 498 U.S. 184, 190 (1991). Moreover, any temporary federal subsistence regulation must be viewed in the context of the Secretary's expectation that the Alaska legislature would quickly return Alaska to compliance. See 55 Fed. Reg. 27,114-15 (June 29, 1990). Finally, it is the interpretation of the United States Subsistence Management Division that federal law applies on federal land that deserves deference. See Pet. 8, n.4.

II. A FEDERAL SUBSISTENCE HUNTER SHOULD NOT HAVE TO FACE STATE CRIMINAL CONVICTION AND INCARCERATION WHEN HE HAS BEEN PRECLUDED BY STATE LAW FROM RAISING A FEDERAL DEFENSE

In Totemoff, the Alaska Supreme Court analyzed Native Village of Quinhagak v. United States, 35 F.3d 388 (9th Cir. 1994), and concluded that, based on that case, "ANILCA does protect customary and traditional means and methods." (Pet. App. 12). Relying on Quinhagak, the court in Alaska Wilderness and Tourism Ass'n v. Morrison, 67 F.3d

723, 731 (9th Cir. 1995) concluded that "[s]ubsistence needs are not limited to maintaining a sufficient food supply, but include customary and traditional practices which ANILCA was designed to protect." Therefore, under federal law, ANILCA's protections extend beyond mere "use". The State now asserts that there is no conflict between state and federal courts. The State is incorrect.

Section 804, 16 U.S.C. § 3114 provides, in relevant part, that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." (Pet. App. 60) (emphasis added). Section 102, 16 U.S.C. § 3120 defines "taking" as the "means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct." (Pet. App. 57) (emphasis added). Changes in technology or techniques by those engaged in subsistence uses do not place those users "outside the scope of this act [ANILCA]." H.R. Rep. No. 95-1045, Part I, 95th Cong.; 2d Sess. 186 (1978).

The recent analysis of State v. Morry, 836 P.2d 358 (Alaska 1992) by the Joint Federal-State Commission on

Policies and Programs Affecting Alaska Natives supports the conclusion that federal law protects customary and traditional hunting practices. Morry relied on federal law under ANILCA to argue that "state regulations must broadly protect the customary and traditional character of subsistence hunting and fishing." Final Report, Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives (vol. III at 35, May 1994). The Alaska Supreme Court rejected that argument, holding that under state law, "customary and traditional" refers only to post-harvest subsistence uses, not the methods and means of harvest themselves. State v. Morry, 836 P.2d at 369-70. The Commission described Morry as "an example of how the gap between federal and state subsistence regulations has been steadily widening since McDowell." Final Report, supra, at 35. The Commission concluded that:

> What Morry shows is that, although subsistence advocates had labored to achieve a judicial interpretation of state regulations that used the concepts and standards of federal law, the effort had not succeeded. State court constructions of state subsistence statutes are now irreconcilably different from federal court interpretations of ANILCA... the whole structure of state law, regulation and judicial interpretation has been moving away from federal law for years... the underlying clash of

> legal ideologies is probably permanent and irreconcilable. Hence, the even greater need, from the viewpoint of subsistence interests, for federal oversight and intervention.

Final Report, supra, at 35-36.

Finally, the State argues that a federal rural subsistence hunter such as Petitioner Totemoff charged in state court has received all federal defenses because he "could defend by claiming ... ANILCA preempt[ion]." Opp. 7,10. This claim is disingenuous. A criminal defendant can always defend on the ground that the court does not have jurisdiction; such a defense is never waived or forfeited. The right to raise a lack of jurisdiction does not cure the "irreconcilable differences" between state and federal law. See Pet. App. 24-25 n. 12.[1]

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[1] The State's statement of the case suggests, without expressly asserting, that Mr. Totemoff's use of a "big fishing boat" in the winter, and the total number of deer in the boats, were improper. Opp. 1. This suggestion in incorrect. Tatitlek Village hunters customarily "took a commercialfishing boat [and] went further [than nearby deer hunting sites] to larger islands in the sound and stayed out longer. Much of the deer hunting involved hunting along the coastline for deer near the water's edge.... Much of the hunting occurred in the winter, after commercial fishing season." Lee Stratton, Resource Harvest and Use in Tatitlek, Alaska, Alaska Dpartment of

CONCLUSION

For the reasons set forth in the petition, and those described here, this Court should grant the Petition for Writ of Certiorari. Alternatively, this Court should summarily reverse the decision below.

DATED: May 13, 1996

Respectfully submitted,

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Fish and Game Technical Paper No. 181 at 113-15. Furthermore, Mr. Totemoff complied with all other applicable laws, including bag and possession limits. As the trial court stated, Mr. Totemoff "had the proper license and tags and it's only a question of the method of taking." (Pet. App. 72)